EDITOR'S NOTE

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ril 1, 1986

Title: United States, Petitioner
v.
John Doe, Inc. I, et al.

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Surrey, Walter Sterling, Grand, Paul K.

try	Date	Note	Proceedings and Orders
1	Feb 21 1986		Application for extension of time to file petition and order granting same until April 1, 1986 (Marshall, February 25, 1986).
2	Apr 1 1986	G	Petition for writ of certiorari filed.
3	May 1 1986		Brief of respondents John Does I, Inc., et al. in opposition filed.
4	May 6 1986		DISTRIBUTED. May 22, 1986
5	May 8 1986	D	Motion of petitioners in No. 85-1840, Archer-Daniels-Midland Company and Nabisco Brands, Inc. v. United States for contemporaneous consideration filed.
6	May 27 1986		Motion of petitioners in No. 85-1840, Archer-Daniels-Midland Company and Nabisco Brands, Inc. v. United States for contemporaneous consideration DENIED.
7	May 27 1986		Petition GRANTED.
			**********
9	Jul 10 1986		Order extending time to file brief of petitioner on the merits until July 25, 1986.
10	Jul 23 1986		Joint appendix filed.
11	Jul 24 1986		Record filed.
12	Jul 24 1986		Certified copy of original record and proceedings received.
13	Jul 25 1986		Brief of petitioner United States filed.
14	Aug 25 1986		Brief amicus curiae of Archer-Daniels-Midland Co., et al. filed.
15	Sep 3 1986		Brief of respondents John Does I & II, et al. filed.
16	Sep 22 1986		CIRCULATED.
17	Nov 14 1986		SET FOR ARGUMENT. Monday, January 12, 1987. (2nd case) (1 hour).
18	Dec 29 1986	X	Reply brief of petitioner United States filed.
19	Jan 12 1987		ARGUED.

85-1613

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE I, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
RICHARD K. WILLARD
Assistant Attorneys General

LOUIS R. COHEN
Deputy Solicitor General

W. STEPHEN CANNON
Deputy Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ROBERT B. NICHOLSON
EDWARD T. HAND
DOUGLAS N. LETTER
ANNA SWERDEL
CAROLYN G. MARK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

54p

QUESTIONS PRESENTED

1. Whether an attorney of the Antitrust Division of the Department of Justice who has properly had access to grand jury materials while conducting a criminal investigation may use the same materials in preparing for and litigating a related civil case without obtaining a disclosure order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

2. Whether the district court acted within its discretion when it issued a Rule 6(e) order authorizing the Antitrust Division to disclose certain grand jury materials to attorneys in the Civil Division and the United States Attorney's Office in order to obtain their advice and ensure consistent federal enforcement of the False Claims Act, a federal statute as to which the Civil Division has the primary enforcement responsibility.

PARTIES TO THE PROCEEDING

Respondents are three corporations—John Does, Inc. I, II, and III, respectively—that are defendants in *United States* v. *"A" Corp.*, 85-Civ.-2062 (S.D.N.Y.), a civil case filed under seal, and five individuals—John Does I, II, III, IV, and V, respectively—who are officers or employees of those corporations but are not defendants in the civil case.[1]

[1] Because of the grand jury secrecy issues involved in this case, both the district court and the court of appeals ordered that the civil complaint filed by the government be kept under seal (C.A. App. 76-77, 78; App., *infra*, 20a).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE I, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 774 F.2d 34. An earlier order entered by the court of appeals (App., *infra*, 19a-20a) is unreported. The orders of the district court (App., *infra*, 21a, 22a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1985. A petition for rehearing was denied on December 2, 1985 (App., *infra*, 24a). On February 25, 1986, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including April 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

Recording and Disclosure of Proceedings.

* * * * *

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel * * * as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such

attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made * * *.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

* * * * *

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT

This case arises out of a federal grand jury investigation into bid rigging and price fixing by American companies in connection with government-financed sales of tallow to a foreign government.[2] The grand jury did not return an indictment, but following a subsequent civil investigation by the same government attorneys as were involved in the grand jury investigations, the United States filed (under seal) a civil complaint charging three of the respondents and one other company with violations of three federal statutes. App., *infra*, 2a-5a.

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[2] Tallow is an animal by-product used chiefly in the manufacture of soap, animal feed, and lubricants.

1. In November 1981, the Agency for International Development of the Department of State notified the Antitrust Division of the Department of Justice that conduct by American companies in connection with AID-financed sales of tallow to a foreign government might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq.* Attorneys from the Antitrust Division conducted an investigation from March 1982 through early June 1984. In the course of the investigation, a grand jury in the Southern District of New York heard testimony from several dozen witnesses and received approximately 250,000 pages of subpoenaed documents (App., *infra*, 2a).

Early in June 1984, the Antitrust Division tentatively concluded that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. 1, but also decided that in the particular circumstances of this case a criminal prosecution was not appropriate. The grand jury investigation was promptly terminated without the return of an indictment. At the same time, however, the Antitrust Division concluded that a civil action against the corporate respondents might be appropriate.[3] Accordingly, the Assistant Attorney General in charge of the Antitrust Division instructed the same attorneys who had conducted the grand jury investigation to pursue a civil investigation of the matter and, if appropriate, to prepare a complaint for civil injunctive relief under the Sherman Act, and to consider a possible action for damages under the False Claims Act, 31 U.S.C. 3729-3731. App., *infra*, 2a.

Late in June 1984, pursuant to the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314, the government issued civil investigative demands (CIDs) for documents to nearly two dozen persons, including the corporate

[3] The government may enforce the Sherman Act through both criminal prosecutions and civil suits. See 15 U.S.C. 1, 4, 15a.

respondents here, that had received grand jury subpoenas duces tecum. The scope of the CIDs overlapped that of the grand jury subpoenas, and the Antitrust Division notified the CID recipients that they could comply with the CIDs by certifying that all documents called for had been produced pursuant to the grand jury subpoenas. Nearly all recipients of CIDs complied in this manner, although two of the corporate respondents, while informally advising the Division that they had previously produced the documents sought, refused to sign certificates. In the course of the civil investigation, Antitrust Division attorneys also interviewed prospective witnesses and obtained documents from certain persons on a voluntary basis. App., *infra*, 2a-3a.

The Antitrust Division ultimately concluded that respondents' conduct violated the Sherman Act and might also be a violation of the False Claims Act. The Division then considered whether to bring a civil suit under both statutes. Although the Civil Division of the Department of Justice is charged with the primary responsibility for enforcing the False Claims Act (see 28 C.F.R. 0.45(d)), the Antitrust Division is authorized to prosecute False Claims Act suits if the conduct in question also violates the antitrust laws (see 28 C.F.R. 0.40(a)). To ensure consistency in the government's enforcement of the False Claims Act, the Antitrust Division sought advice from the Civil Division regarding the propriety of bringing a False Claims Act suit on the facts developed. Because venue for the proposed civil suits would lie in the Southern District of New York, the Antitrust Division also sought advice from the United States Attorney's office for that district.

The Antitrust and Civil Divisions then entered into preliminary discussions of the case that did not involve the disclosure of grand jury material (App., *infra*, 3a). However, the Civil Division indicated that it could not fully advise the Antitrust Division without a description of

certain information contained in the grand jury record. Accordingly, on November 30, 1984, the Antitrust Division sought an order, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, from the United States District Court for the Southern District of New York authorizing the disclosure of information contained in the grand jury record to four named attorneys in the Civil Division, two named attorneys in the United States Attorney's Office, and other attorneys of the Division or the Office designated by them. App., *infra*, 3a-4a. In a memorandum accompanying its motion, the Antitrust Division stated that the information sought to be disclosed "includes a description and analysis of the evidence * * * uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury" (C.A. App. 7). The Division stated that it believed its need to disclose the grand jury materials to these government attorneys for the limited purpose of consultation to ensure consistent enforcement of federal civil law outweighed the need for continued secrecy from these attorneys (*id.* at 10-11).[4] See also 11/29/84 Affidavit of

[4] As the memorandum explained (C.A. App. 10-11):

> The disclosure of information is necessary to ensure the proper functioning of the decision-making process of the U.S. Department of Justice. In order properly to exercise its prosecutorial discretion, review of the memoranda by the Civil Division is necessary to ensure that the Department acts consistently in its enforcement efforts. The review is also important to ensure that prosecution of this matter would carry out Department policy regarding the False Claims Act. Moreover, without disclosure of this information, the Antitrust Division would not be able to take full advantage of the Civil Division's expertise in enforcing cases under the False Claims Act.
>
> Coordination between the Civil Division and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts if its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other divisions. This uniformity of enforcement is necessary not only to the Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

Anna Swerdel para. 9 at 16; C.A. App. 16. The Division made clear that the requested disclosure was "not for purposes of further investigation" by the Civil Division or the United States Attorney (C.A. App. 9). After an ex parte hearing, the district court entered a Rule 6(e) order permitting the Antitrust Division to disclose matters occurring before the grand jury to the six specified attorneys in the Civil Division and the United States Attorney's Office and their designees "to assist in the review of this matter provided that this information will be treated as confidential and its use will be limited solely to the purposes of this order" (App., *infra*, 23a; see *id.* at 4a).

In the following weeks, the Antitrust Division provided the specified government attorneys with four memoranda prepared by the Antitrust Division that analyzed and quoted from the documentary and testimonial evidence presented to the grand jury. Some subpoenaed documents were attached to these memoranda. After analyzing this information and discussing it with attorneys from the Antitrust Division, the Civil Division advised the Antitrust Division that a False Claims Act suit would be appropriate. App., *infra*, 4a.

2. Early in March 1985, the Antitrust Division informed the corporate respondents that it intended to file a civil complaint against them within two weeks (App., *infra*, 4a). On March 11, 1985, respondents moved in the United States District Court for the Southern District of New York for an order vacating the outstanding Rule 6(e)

order and prohibiting the government from using any material obtained by the grand jury in preparing, filing, or litigating the civil suit (C.A. App. 46-47; App., *infra*, 4a). After a hearing,[5] the district court denied the requested relief (*id.* at 4a, 21a). The court rejected respondents' argument that the government had failed to demonstrate a particularized need for the Rule 6(e) order. The district court stated at a hearing on respondents' motion, "[t]he entire impact of the papers [the government] submitted was to show there was a particularized need. * * * [Government counsel] went through a great deal of trouble to indicate why they were necessary * * * (C.A. App. 66). The district court also denied respondents' motion to enjoin the government from filing its complaint and to disqualify the Antitrust Division attorneys who had participated in the grand jury investigation from participating in the civil suit, "without prejudice to [its] renewal before the trial judge * * * assigned when [the] case is filed" (App., *infra*, 21a).[6] The district court ordered that the complaint be filed under seal to protect the defendants' privacy. C.A. App. 76-77, 78.

Shortly thereafter, the United States filed a civil complaint under seal in *United States* v. *"A" Corp.*, No. 85-Civ.-2062 (S.D.N.Y.), charging the three corporate repondents (and one company that is not a respondent) with: (1) bid rigging and price fixing, in violation of

[5] Respondents' motion was originally assigned to Judge Brieant. After a hearing (C.A. App. 50-58), Judge Brieant denied the motion without prejudice, on the ground that it should be presented to Judge Palmieri, who had issued the Rule 6(e) order (C.A. App. 59). After a second hearing (*id.* at 60-78), Judge Palmieri denied respondent's motion, and it was his ruling that was later set aside by the court of appeals.

[6] The district court also concluded that it would be unfair to enjoin the filing of the complaint since the statute of limitations might run in the near future on some of these claims. C.A. App. 70-71.

Section 1 of the Sherman Act, 15 U.S.C. 1; (2) conspiring to defraud the United States, in violation of the False Claims Act, 31 U.S.C. 3729-3731; (3) making false claims against the United States, in violation of the Foreign Assistance Act of 1961, 22 U.S.C. 2399b; and (4) unjust enrichment at common law. The complaint contains no quotation from or reference to any grand jury transcript or any document subpoenaed by the grand jury, no mention of any witness before the grand jury, and no other mention (express or implied) of the existence or the workings of the grand jury. See App., *infra*, 5a.

3. The court of appeals reversed (App., *infra*, 1a-18a).[7] The court ruled that the district court's Rule 6(e) order should be vacated because the Antitrust Division had not demonstrated a particularized need for disclosure.[8] The court of appeals recognized that under *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), the district court was " 'infused with substantial discretion' " in deciding whether to authorize disclosure (App., *infra*, 6a (citation omitted)), and it acknowledged that the particularized need standard "is a highly flexible one" that accommodates considerations peculiar to the government " 'that weigh for or against disclosure in a given case' " (*id.* at 7a (citation omitted)). In particular, the court of appeals

[7] After filing a notice of appeal, respondents asked the court of appeals for a protective order prohibiting the government from using grand jury materials pending appeal in preparing, filing, or litigating the proposed civil action and prohibiting the Antitrust Division from making any further disclosure to the Civil Division. The court of appeals refused to prohibit the United States from filing its complaint, but directed that the complaint be filed under seal pending the resolution of respondents' appeal. App., *infra*, 19a. The court also prohibited the disclosure of grand jury material to anyone who was not already privy to the information (*id.* at 20a).

[8] However, the court of appeals rejected respondents' argument that the district court had erred by granting the order after an ex parte hearing pursuant to Fed. R. Crim. P. 6(e)(3)(D) (App., *infra*, 5a-6a).

noted (*id.* at 9a) that the reasons given in this case by the Antitrust Division for the disclosure of grand jury materials to the Civil Division "are perhaps more compelling on their face than those advanced" in *Sells* and *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557 (1983).

Nonetheless, the court of appeals concluded that the district court had improperly authorized disclosure because the Antitrust Division could have provided the Civil Division with "substantially the same information" by exercising its discovery powers under the ACPA (App., *infra*, 9a). The court acknowledged that this would entail "a certain amount of duplication" and would require the investment of "a substantial amount of additional government time and effort," but concluded that, under *Sells*, "such a factor can play no part in our analysis" (App., *infra*, 10a). Finally, despite the very narrow purpose for which disclosure was sought and permitted (see pages 6-7, *supra*), the court of appeals stated that the breadth of the district court's Rule 6(e) order "influenced" its assessment of the government's showing of particularized need (App., *infra*, 10a), since neither the government's request for disclosure nor the district court's Rule 6(e) order specified precisely what grand jury materials were to be revealed (App., *infra*, 11a). Accordingly, the court of appeals vacated the Rule 6(e) order (App., *infra*, 11a).

The court then turned to the question whether the Antitrust Division attorneys who had conducted the grand jury investigation could, in preparing for and litigating the contemplated civil suits, use the grand jury materials that they had already seen without first obtaining a Rule 6(e) order (App., *infra*, 11a-17a).[9] The court noted that the "issue presented here is more subtle" than the one that was decided by this Court in *Sells*, in which the Court "expressly

[9] Rule 6(e)(3)(A)(i) provides that disclosure otherwise prohibited by Rule 6(e) may be made to "an attorney for the government for use in the performance of such attorney's duty." See page 2, *supra*.

left this question unresolved" (App., *infra*, 11a-12a). In particular, the court of appeals recognized that "[t]he threshold question is whether the continued access to grand jury materials by the attorneys who conducted the grand jury investigation—and worked with the materials during that time—constitutes 'disclosure' " for purposes of Rule 6(e) (App., *infra*, 12a). The court acknowledged that it "seems fictional at first glance" to characterize as "disclosure" the mere access by the same attorneys during a civil suit to the materials they had reviewed during the criminal investigation (*ibid.*). But the court concluded that this characterization was justified in this case because the sizeable volume of grand jury materials would invite the government attorneys to refresh their recollection by referring "repeatedly to the documents and transcripts of which they have prior knowledge and with which they may be partially familiar" (*ibid.*).

The court of appeals buttressed its conclusion by referring to the reasons stated in *Sells* for limiting access to grand jury materials. App., *infra*, 13a-17a. The court recognized that one of these concerns—the threat to the integrity of the grand jury from its potential manipulation as a civil investigative device (see *Sells*, 463 U.S. at 432-433)—"is largely absent in this case," since the Antitrust Division's extensive pre-complaint discovery powers under the ACPA eliminate any incentive to employ the grand jury process merely to obtain information for use in a civil suit (App., *infra*, 13a-14a).[10] For the same reason,

[10] Under the ACPA, the Attorney General or the Assistant Attorney General for the Antitrust Division, before a civil complaint is filed, may require "any person" to produce documentary material, give written answers to interrogatories, provide oral testimony, or furnish any combination of the above, whenever he has reason to believe that this information is relevant to a civil antitrust investigation. 15 U.S.C. 1312(a); see *Associated Container Transp. (Australia) Ltd.* v. *United States*, 705 F.2d 53, 58 (2d Cir. 1983). The court of appeals recognized (App., *infra*, 9a) that this power should be broadly construed. See *Associated Container*, 705 F.2d at 58.

the court of appeals acknowledged that a second concern identified in *Sells*—that the automatic disclosure of grand jury materials would subvert the limitation on a party's discovery powers (see 463 U.S. at 433)—also had little force here (App., *infra*, 14a-15a).

However, the court of appeals concluded that the general secrecy concerns discussed in *Sells*—such as the risk of an illegal or inadvertent disclosure and the chilling effect of that risk on a witness's willingness to testify freely before the grand jury (see 463 U.S. at 432)—did apply here (App., *infra*, 15a-17a). The court stated that continued access by the attorneys who handled the grand jury investigation would involve only "limited" disclosure. But the court assumed that the continuing access by the attorneys would involve additional exposure of grand jury materials to secretaries and paralegals assisting the attorneys and that this would constitute a harmful, additional "disclosure" in contravention of Rule 6(e), even though those secretaries and paralegals may have previously seen the same material during the course of the grand jury's investigation (App., *infra*, 15a-16a).[11] The court also stated that continued access to grand jury materials by the attorneys who appeared before the grand jury would tend to discourage grand jury witnesses from speaking candidly (*id.* at 16a). The court conceded that the "threat of affirmative mischief" was " somewhat less than that present in *Sells*" (*ibid.*), if not "minimal" (*id.* at 17a), and confessed that it was "tempted" to conclude that the Antitrust Division attorneys need not obtain a Rule 6(e) order in these circumstances (App., *infra*, 16a-17a). But

[11] The court of appeals stated that this was a substantial problem because "it seems probable" that new support personnel might be needed to work on the civil case and because disclosure to secretaries and paralegals, "even if not in itself in violation of [Rule 6(e)], would increase the risk of inadvertent disclosure to nongovernment personnel" (App., *infra*, 16a).

the court nonetheless felt obliged to rule in respondents' favor because of "the reluctance imposed on us from above" (*id.* at 17a).

Finally, the court of appeals rejected respondents' claim that the mere filing of the government's civil complaint, which "does not quote from or refer to any grand jury materials," was itself an unauthorized "disclosure" of grand jury material (App., *infra*, 17a). The court therefore granted respondents' request for relief "only to the extent that we prohibit any further access to or use of grand jury materials by the [government] in the pending civil action, unless and until" the government obtains a Rule 6(e) order (App., *infra*, 17a).[12]

REASONS FOR GRANTING THE PETITION

This case presents two related questions of substantial practical importance to the government's ability to enforce federal law in civil litigation. In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), the Court held that grand jury materials may not be disclosed, for use in civil litigation, to attorneys of the Department of Justice who had no part in the grand jury investigation, unless the government makes the showing of particularized need required by Fed. R. Crim. P. 6(e)(3)(C)(i) and obtains a court order authorizing such disclosure. The Court expressly declined to address "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the

[12] Respondents did not contend that an attorney who participated in the grand jury proceedings may not rely on his recollection of the information learned by the grand jury in those proceedings in the litigation of a subsequent civil case (App., *infra*, 17a). Accordingly, the court of appeals expressly declined to consider that question (*ibid.*).

criminal proceeding." 463 U.S. at 431 n.15.[13] The court of appeals has now decided the issue reserved in *Sells*, ruling that the same government attorneys who conducted the grand jury proceeding must obtain a Rule 6(e) order before reviewing grand jury materials in connection with subsequent civil litigation. That ruling, which is contrary to the plain language of Rule 6(e) and is not justified by the legislative history of the Rule or by any of the concerns underlying this Court's ruling in *Sells*, will impose a significant additional burden on the Department of Justice in the conduct of civil litigation.

The court of appeals greatly exacerbated the adverse practical effect of its ruling by holding that the delay and expense involved in re-obtaining through other means the testimony and documents obtained by the grand jury can play "no part" in determining whether the government has shown the "particularized need" required by Rule 6(e). App., *infra*, 10a. This Court made clear in *Sells* that, in ruling on disclosure requests, district courts should take into account "any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case" (463 U.S. at 445). The government set forth compelling considerations in this case, but the court of appeals ruled, in effect, that the government cannot obtain a Rule 6(e) order authorizing any use of grand jury

[13] The Chief Justice, joined in dissent by Justices Powell, Rehnquist, and O'Connor, read the Court's decision as "allowing any Justice Department attorney who has participated in the grand jury investigation or prosecution—and thus already has had access to the grand jury materials—to make further use of those materials in preparing and litigating a related civil case" (463 U.S. at 473).

materials, no matter how valid or limited that use may be, if those materials could be re-obtained through other means, no matter how burdensome they may be.

The combined effect of these two rulings is that even where there is no additional dissemination of grand jury materials (*i.e.*, where they will be used by the same government attorneys) or where there is only a very limited additional dissemination for an important and wholly legitimate purpose that is unique to the federal government (*i.e.*, where the materials will be disclosed to government attorneys solely for purposes of consultation on government enforcement policy), the government must either re-acquire the same materials through costly and time-consuming alternatives or forego their use entirely. Because the decision below will require the government to squander scarce resources or forego the enforcement of valid civil claims but will not materially advance the secrecy objectives underlying this Court's decision in *Sells*, review by this Court is warranted despite the absence of a conflict among the circuits.

1. a. The Antitrust Division, the Civil Division, and many U.S. Attorney's offices often use the same attorneys in successive, related criminal and civil investigations. Both before and since this Court's decision in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), it has been the understanding of the Department of Justice that, if the decision is made not to seek an indictment and the same attorneys are used, these attorneys may review the grand jury materials, to which they have already had access, during the course of subsequent investigation and preparation for a civil suit. The Second Circuit's ruling, which now forbids that practice in that circuit, will mean that some important litigation will be needlessly expensive and some will not be brought at all.

Conducting a duplicate civil investigation after the completion of a criminal investigation will often require substantial additional time. This is particularly true in complex antitrust cases because of the volume of documents and testimony that must be collected and analyzed. In order to avoid problems of staleness or the running of the statute of limitations, the Antitrust Division may be forced to conduct simultaneous but separate criminal and civil investigations whenever there is a realistic possibility that civil litigation will ensue.[14] The cost of that course to the government, including the depletion of scarce attorney resources, would be substantial. As Chief Justice Burger observed in *Sells*, that cost is a matter of serious public concern (463 U.S. at 469-470 (dissenting opinion)). In some cases, otherwise appropriate civil litigation in the Second Circuit may not be pursued at all, because the Antitrust Division lacks the resources necessary to engage in double staffing or could not predict at the outset that a simultaneous separate civil investigation would be a prudent use of the Division's resources.[15]

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[14] The court of appeals' ruling does not prohibit the same attorneys from conducting successive criminal and civil investigations. (The court stated that since respondents had not contended that the attorneys who conduct a criminal investigation are, *ipso facto*, disqualified from litigating the civil case, the court would not address that question (App., *infra*, 17a).) But even where time permits this course, (a) successive investigations may be almost as wasteful of attorney resources as double staffing, and (b) the attorneys may be challenged repeatedly in the civil proceedings to establish that they did not make improper use of grand jury materials to which they once had access.

[15] The Second Circuit's ruling creates uncertainty that will influence the Department's activities elsewhere. The Antitrust Division's field offices and many of the United States Attorneys' offices in other circuits are small and generally use the same attorneys in both criminal and civil cases. These offices may be forced to alter this practice in important cases to avoid the risk of being found to have violated Rule 6(e).

The major changes in the Division's longstanding practice that would be required in the Second Circuit by the court of appeals' interpretation of Rule 6(e) and the wholly unjustified new burden that this decision would place on the government's ability to enforce federal civil law warrant this Court's intervention.

b. The court of appeals recognized (App., *infra*, 12a) that this case presents the question, reserved in *Sells*, whether the use of grand jury materials by the same attorneys who participated in the grand jury's investigation constitutes a "disclosure" within the meaning of Rule 6(e). The common meaning of that word, which is not defined in the Rule, would only forbid dissemination of grand jury materials to a person who has not previously seen them. The word "disclose" means to reveal (*Webster's Third New International Dictionary* 645 (1976 ed.)), and no revelation occurs when, as here, the attorneys who participated in a grand jury investigation review the same materials that were properly obtained by the grand jury during the course of its investigation.

The court of appeals agreed that calling such review a "disclosure" "seems fictional at first glance" (App., *infra*, 12a). But the court nonetheless reasoned that, since the amount of grand jury materials in this case was too great for any person to commit to memory, the attorneys preparing the civil suit would need to refer to at least some of these materials, and concluded that "any resort to th[o]se materials by the[se] attorneys * * * to refresh their recollection * * * is tantamount to a further disclosure" (*ibid.*). That construction of the term "disclosure" is highly artificial.[16] As the Eighth Circuit recently held,

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[16] The only authority cited by the court of appeals was the statement in the Ninth Circuit's opinion in *Sells* that " '[e]ach day this order remains effective the veil of secrecy is lifted higher * * * by the continued access of those to whom the materials have already been disclosed.' " App., *infra*, 12a-13a (asterisks in original) (quoting *In re*

"[f]or there to be a disclosure [under Rule 6(e)], grand jury matters must be disclosed to *someone*" (*United States* v. *Archer-Daniels-Midland Co.*, No. 85-1050 (Feb. 24, 1986), slip op. 12 (emphasis in original)), and it is entirely unrealistic to construe the investigating attorneys' re-examination of these materials as a "disclosure" to themselves.

c. The legislative history of Rule 6(e) also does not indicate that the drafters of the Rule or Congress intended to forbid the longstanding practice followed by the Department of Justice. Neither the advisory committee notes to the original version of Rule 6(e) or to its amendments nor the legislative history of the 1977 congressional revisions of the Rule contain any hint that an attorney who participated in the grand jury investigation may not refer to the grand jury materials during the course of a subsequent civil suit. See 18 U.S.C. App. at 567-572; S. Rep. 95-354, 95th Cong., 1st Sess. (1977); H.R. Rep. 95-195, 95th Cong., 1st Sess. (1977). Indeed, to the extent that the legislative history touches on this matter, it suggests that the Department's practice is consistent with the purposes underlying the Rule. As the Court pointed out in *Sells*, "[t]he draftsmen of the original Rule 6 provided that, in certain circumstances, government attorneys were entitled to obtain automatic access to grand jury materials " 'inasmuch as they may be present in the grand jury room

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Grand Jury Investigation No. 78-184 (Sells, Inc.), 642 F.2d 1184, 1188 (1981), aff'd, 463 U.S. 418 (1983)). But the Ninth Circuit was making an entirely different point. In *Sells*, the government attorneys who handled the grand jury investigation physically handed over—and therefore clearly "disclosed"—grand jury materials to Civil Division attorneys who had not appeared before the grand jury. The Ninth Circuit did not purport to define "disclosure"; rather, the passage quoted by the court below responded to the government's argument that the question whether a Rule 6(e) order was required was moot, since the transfer had already taken place. See 463 U.S. at 422 n.6.

during the presentation of evidence.' " 463 U.S. at 428 (quoting Fed. R. Crim. P. 6(e) advisory committee note, 18 U.S.C. (1976 ed.) App. at 1411). The advisory committee's notes to the original Rule 6(e) therefore suggest that the subsequent review of grand jury materials by those attorneys (and their supervisors) who either did appear or were entitled to appear before the grand jury presents no secrecy concern.

d. The court of appeals' definition of "disclosure" also does not materially further the purpose of the Rule, which is to minimize the dissemination of grand jury materials. Attorneys who participated in the grand jury proceedings are already aware of the subject matter and content of the grand jury materials. It can hardly be suggested that their reliance on their own memories of those materials in preparing for and litigating a civil suit or in shaping the course of civil discovery involves a "disclosure." See *Archer-Daniels-Midland*, slip op. 12 ("[w]e do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered [a] disclosure" within the meaning of Rule 6(e)). And there is no virtue in requiring an attorney to rely on his possibly inaccurate memory when documents are available. Cf. *United States* v. *Jacobsen*, 466 U.S. 109, 119 (1984) ("avoiding the risk of a flaw in the employees' recollection * * * hardly enhances any legitimate privacy interest").[17]

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[17] Nor does this Court's decision in *Sells* support the court of appeals' ruling. There, one group of attorneys physically handed over grand jury transcripts and documents to other attorneys who had not been involved in the grand jury proceeding (463 U.S. at 420-422), so there clearly was a "disclosure." (By contrast, in this case the only disclosure of grand jury materials was by the Antitrust Division to the Civil Division solely for consultation and pursuant to a Rule 6(e) order.) As noted above, the Court in *Sells* therefore expressly declined to resolve the question presented in this case. 463 U.S. at 431 n.15.

In *Sells*, the Court identified three reasons for the reading of Rule 6(e) adopted in that case (463 U.S. at 431-434).[18] The court of appeals recognized that two of those concerns—the risk of misuse of the grand jury for the purposes of uncovering evidence for a civil suit, and the risk of circumvention of the limitations imposed on the government's civil discovery powers—do not exist in the present case because of the Antitrust Division's broad pre-complaint discovery powers under the ACPA (App., *infra,* 13a-15a; see also page 11 note 10, *supra).*[19] But the court of appeals thought that the Court's remaining concern in *Sells*—the consequences of dissemination itself—was applicable here (App., *infra,* 15a, citing *Sells,* 463 U.S. at 431). The court of appeals identified only two reasons for such concern, and neither one supports its decision.

i. First, although the court of appeals acknowledged that permitting the same attorneys to use grand jury materials poses no significant problem, the court believed—citing Rule 6(e)(3)(A)(ii)[20]—that access by secretaries and paralegals would pose a "significant" additional risk of "illegal or inadvertent disclosure" (App., *infra,* 15a). This conclusion is wrong. In the analogous

[18] The secrecy of grand jury proceedings is also justified on other grounds not relevant here. See *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211, 219 (1979); *United States* v. *Procter & Gamble Co.,* 356 U.S. at 681-682 n.6.

[19] Respondents have never suggested that the grand jury proceedings were not conducted for entirely bona fide criminal investigative purposes. Any such allegation in another case could be dealt with on its merits.

[20] Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by Rule 6(e) may be made to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." See page 2, *supra.*

situation of the attorney-client privilege, the attorney's secretary and support staff are considered to be extensions of the attorney, and communication of a client's confidences to such persons does not destroy the privilege.[21] Moreover, the court of appeals misconstrued Rule 6(e)(3)(A)(ii). The congressional reports and advisory committee notes to that provision show that it was adopted to permit attorneys to reveal grand jury materials to assistants such as auditors, investigators, or attorneys from federal agencies;[22] there is no hint in the legislative history that the provision was necessary or designed to permit an attorney's secretary or paralegal to have access to grand jury materials.[23] In fact, *Sells* itself appeared to recognize that the disclosure to an attorney permits secretaries and paralegals to use grand jury materials when necessary. See 463 U.S. at 420.[24]

[21] See, *e.g., United States* v. *Kovel,* 296 F.2d 918, 921 (2d Cir. 1986); *Burlington Industries* v. *Exxon Corp.,* 65 F.R.D. 26, 40 (D. Md. 1974); *Zenith Radio Corp.* v. *RCA,* 121 F. Supp. 792, 794 (D Del. 1974); 2 D. Louisell & C. Mueller, *Federal Evidence* § 209, at 754 (1985); C. McCormick, *Evidence* § 91, at 218 (3d ed. 1984); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 503 (a)(3)[01], at 503-524 (1985); 8 J. Wigmore, *Evidence in Trials at Common Law* § 2301, at 583 (J. McNaughton rev. ed. 1961).

[22] See 18 U.S.C. App. at 568, 569-570; S. Rep. 95-354, *supra,* at 6-7; H.R. Rep. 95-195, *supra,* at 3-4.

[23] In *Sells,* this Court commented that the 1977 amendment was necessary "because Justice Department attorneys found that they often needed active assistance from *outside* personnel—not only investigators from the Federal Bureau of Investigation, IRS, and other law enforcement agencies, but also accountants, handwriting experts, and other persons with special skills" (463 U.S. at 436 (emphasis added)).

[24] As the Court stated (463 U.S. at 420 (emphasis added)): "The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, *their paralegal and secretarial staff,* and all other necessary assistants, may obtain access to grand jury materials * * *."

ii. Second, the court of appeals thought that any use of grand jury materials in civil proceedings would make grand jury witnesses less willing to testify freely and candidly (App., *infra,* 16a). But the Second Circuit itself recently observed that, since the 1970 amendment to the Jencks Act, 18 U.S.C. 3500(e)(2), made the release of grand jury testimony "a frequent occurrence * * * [e]very sophisticated grand jury witness" "knows that, if he becomes a witness at trial, his grand jury testimony will most likely be revealed to the public. For future witnesses trying to decide whether to testify before grand juries, the marginal deterrent effect" of limited disclosure in any particular case "can only be trivial." *Executive Securities Corp.* v. *Doe,* 702 F.2d 406, 409-410 n.4 (2d Cir.), cert. denied, 464 U.S. 818 (1983).[25] In any event, this concern, by itself, is insufficient to overcome the straightforward meaning of the term "disclosure."

2. The court of appeals greatly exacerbated the adverse effect of the holding described above by also ruling that the burden of duplicate discovery is entitled to no weight in determining whether there is a "particularized need" justifying a Rule 6(e) order. Accordingly, because this aspect of that court's decision is closely related to the one discussed above, this Court should review that issue as well.

Rule 6(e)(3)(C)(i) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made * * * when so directed by a

[25] Antitrust Division attorneys who conduct a grand jury investigation routinely inform witnesses that the grand jury is inquiring whether there has been a criminal violation of the Sherman Act. It is thus unlikely that witnesses who are testifying about possible criminal activity punishable by up to three years' imprisonment will be "chilled" merely by the prospect that their testimony might lead to a civil case being brought instead of or in addition to any criminal action.

court preliminarily to or in connection with a judicial proceeding * * *" upon a showing of particularized need.[26] In seeking authorization to disclose certain grand jury materials to the Civil Division for consultative purposes in this case, the Antitrust Division clearly made such a showing of particularized need, and the district court so held. The Antitrust Division needed the expert advice of the Civil Division in determining whether to file a civil suit under a statute for which the Civil Division has the primary federal enforcement responsibility.[27] Of course, the Antitrust Division attorneys who conducted the grand jury investigation and would prosecute the civil suit could determine whether respondents had violated the False Claims Act. But these attorneys could not be certain whether bringing suit under the Act on these facts would be consistent with the overall enforcement policy of the Department of Justice, as developed by the Civil Division. At the same time, the Civil Division could not offer the Antitrust Division meaningful guidance on the matter without knowing the particular facts of this case, and the Civil Division could not itself obtain the facts, since it lacks the Antitrust Division's pre-complaint discovery powers. See *Sells*, 463 U.S. at 433.

The court of appeals accepted all of this (App., *infra,* 7a-9a) but nevertheless concluded that the Antitrust Division had not demonstrated a particularized need for the grand jury materials because the Division could have reobtained relevant information pursuant to the ACPA (*id.* at 9a-11a). In essence, the court of appeals ruled that,

[26] That is, persons seeking such disclosure must show that "the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed" (*Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. at 222 (footnote omitted)).

[27] Rule 6(e) orders can properly be obtained in aid of civil investigations. See, *e.g., United States* v. *Baggot,* 463 U.S. 476 (1983).

because the Antitrust Division *could* have duplicated much of the necessary information through the ACPA and then revealed it to the Civil Division (with citations to CID returns and depositions, rather than to grand jury documents and transcripts), the Antitrust Division was *obliged* to do so, rather than seek a disclosure order. The court acknowledged that this course would have entailed time-consuming duplication of effort (*id.* at 10a), but it ruled that such factors "can play no part in our analysis" (*ibid.*). That ruling is inconsistent with the Seventh Circuit's post-*Sells* application of Rule 6(e) in *In re Grand Jury Proceedings (Miller Brewing Co.)*, 717 F.2d 1136, 1138 (1983), which recognized that the time and expense of pursuing alternative discovery procedures may be considered when the government seeks a Rule 6(e) order.

Moreover, the court of appeals ultimately gave no weight to either the importance or the narrowness of the purpose for which the district court authorized disclosure. Under the district court's Rule 6(e) order (see App., *infra*, 23a), the Civil Division was not authorized to publish the materials or use them for its own purposes, but was limited to a consultative role in the False Claims Act portion of a lawsuit to be brought and litigated by the Antitrust Division. The court of appeals' failure to consider the nature of the disclosure is squarely at odds with this Court's ruling in *Sells* that courts should take into account "any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case." 463 U.S. at 445. The effect of the court of appeals' ruling here is to set a standard for disclosure when the government is the movant that is much stricter than the one that the Court contemplated in *Sells*. This standard would needlessly encumber the government's ability to enforce federal law, without making any material contribution to legitimate secrecy concerns. Accordingly, review of this aspect of the decison below is also warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
RICHARD K. WILLARD
Assistant Attorneys General

LOUIS R. COHEN
Deputy Solicitor General

W. STEPHEN CANNON
Deputy Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ROBERT B. NICHOLSON
EDWARD T. HAND
DOUGLAS N. LETTER
ANNA SWERDEL
CAROLYN G. MARK
Attorneys

MARCH 1986

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1157—August Term, 1984

Docket No. 85-6054

IN RE: GRAND JURY INVESTIGATION.

JOHN DOES I, II, III, IV, V and
JOHN DOES, INC. I, II, and III,

Appellants,

—against—

UNITED STATES OF AMERICA,

Appellee.

(Argued: April 9, 1985 Decided: September 24, 1985)

Before:

KEARSE, PIERCE, and PRATT, *Circuit Judges.*

PRATT, *Circuit Judge*:

This is an appeal by five anonymous individuals and three anonymous corporations who were subjects of a grand jury investigation. After the investigation terminated without indictments, the Antitrust Division of the Department of Justice obtained an *ex parte* order under rule 6(e) of the Federal Rules of Criminal Procedure allowing disclosure of grand jury material to the civil division of the justice department and subsequently filed a civil complaint against the appellants. Appellants appeal

from the denial of their motion to vacate the rule 6(e) order and for protective relief preventing the antitrust division from using grand jury materials to litigate the civil action.

BACKGROUND

This appeal arises out of a federal grand jury investigation into bid-rigging and price-fixing by American companies in United States government-financed sales of a product to a foreign government. After notification by the Department of State that conduct by American companies engaged in these sales might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. §§ 1 & 2, the Antitrust Division of the Department of Justice initiated a criminal investigation. During the investigation, a grand jury in the Southern District of New York heard the testimony of dozens of witnesses, including the individual appellants, and subpoenaed approximately 250,000 pages of documents, some of them documents from the corporate appellants.

In early June 1984 the antitrust division tentatively concluded that although appellants had violated § 1 of the Sherman Act, criminal prosecution was not warranted under the circumstances, and the grand jury dissolved without returning any indictments. Even though it had dropped the criminal investigation, the antitrust division concluded that a civil action might be appropriate. The same government attorneys in the antitrust division who had conducted the grand jury investigation were instructed to pursue a civil investigation and, if appropriate, to prepare a civil complaint.

In late June 1984 the United States issued civil investigative demands (CIDs) for documents, pursuant to the Antitrust Civil Process Act (ACPA), 15 U.S.C. § 1311-14, to approximately two dozen persons, including the corporate appellants here, from whom the grand jury

had subpoenaed documents. Since the scope of the CIDs overlapped that of the grand jury subpoenas, the antitrust division notified the CID recipients that they could comply with the CIDs by returning a certificate of compliance certifying that all documents called for by the CIDs had been produced pursuant to the grand jury subpoenas. While nearly all of the companies complied with this procedure, two of the three corporate appellants refused to sign the certificate of compliance, although the antitrust division advises that these two corporations informed the division informally that all documents sought in the CIDs had been produced pursuant to the subpoenas.

After further investigation the antitrust division determined that the appellants' conduct had violated both the Sherman act and the false claims act, 31 U.S.C. § 3729-31, and considered whether to bring its civil suit under both acts. Although the civil division of the justice department is charged with the primary duty of enforcing the false claims act, *see* 28 C.F.R. § 0.45(d), the antitrust division, as well, may bring such suits if the conduct in question also is alleged to violate the antitrust laws, *see* 28 C.F.R. § 0.40(a). In order to ensure "uniform and fair enforcement" of the false claims act, the antitrust division determined that it needed advice from the civil division as to whether, under the circumstances, a false claims action was warranted. The antitrust division also decided that in view of the venue of the action, it needed to secure similar advice from the office of the United States Attorney for the Southern District of New York.

The civil and antitrust divisions entered into preliminary discussions that did not involve disclosure of grand jury material. When the civil division indicated that it could not give the requested advice without access to certain grand jury materials, the antitrust division filed its *ex parte* motion, under seal, for an order pursuant to rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure

permitting disclosure of certain matters that had occurred before the grand jury to both the civil division and the southern district United States Attorney's office.

After a hearing, Judge Palmieri entered a rule 6(e) order permitting "matters occurring before the grand jury" to be disclosed to specified attorneys or their designees in the two offices "provided that this information [would] be treated as confidential and its use [would] be limited solely to the purposes of this order."

The antitrust division subsequently prepared and provided the designated attorneys with four factual memoranda that analyzed and quoted from documentary and testimonial evidence presented to the grand jury. Some subpoenaed documents were attached to the memoranda. After reviewing this information, the civil division advised the antitrust division that a suit under the false claims act would be appropriate.

In early March 1985 the antitrust division notified appellants that it would file a civil complaint against them within two weeks. Appellants immediately moved in the district court to vacate the rule 6(e) order and for a protective order "prohibiting the use of grand jury material obtained in the * * * investigation in preparing, filing or litigating the civil action contemplated by the Antitrust Division". After a hearing, Judge Palmieri denied the requested relief.

After filing a notice of appeal, appellants moved in this court to prohibit any further disclosure or use of the grand jury material pending resolution of the appeal. We denied the requested interim relief, but ordered that the appeal be expedited and that the anticipated complaint be sealed upon its filing in the district court. We also prohibited any disclosure of grand jury material to anyone not already privy to the information.

The complaint then filed under seal by the government does not quote from or refer to any grand jury transcripts or documents subpoenaed by the grand jury, and does not mention any witnesses before the grand jury or even refer to the existence of a grand jury.

On appeal, the appellants contend that: (1) an *ex parte* proceeding on the rule 6(e) motion was improper; (2) the principle of grand jury secrecy requires vacatur of the rule 6(e) order; and (3) the antitrust division may not use grand jury materials to litigate this civil case in the absence of a rule 6(e) order permitting such use.

DISCUSSION

I. *The Rule 6(e) Order.*

A. The *Ex Parte* Hearing.

Appellants first argue that the district court should not have granted the rule 6(e) order *ex parte*, but instead should have given notice to the appellants and held an adversary hearing.

Prior to 1983, rule 6(e) contained no provision for *ex parte* hearings. Nevertheless, the senate report on the 1977 amendments to rule 6(e) stated that "[i]t is contemplated that the judicial hearing in connection with an application for a court order by the government under [rule 6(e)(3)(C)(i)] should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy." S. Rep. No. 354, 95th Cong., 1st Sess. 8, *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 532.

Rule 6(e)(3)(D), which took effect in 1983, explicitly provides that a petition for disclosure made pursuant to rule 6(e)(3)(C)(i) may be made *ex parte* "when the petitioner is the government". The Advisory Committee note on the 1983 amendment to rule 6(e)(3)(D) points out that "the rule provides only that the hearing 'may' be *ex parte*

when the petitioner is the government", thus allowing the court to decide the matter "based upon the circumstances of the particular case."

Appellants contend that an adversary hearing would not have jeopardized grand jury secrecy since they were fully aware of the concluded grand jury investigation at the time of the government's request and nothing that was presented to the court *ex parte* was unknown to them. The government argues, however, that the facts sought to be disclosed were such that any meaningful discussion at an adversary hearing would have disclosed to the appellants the grand jury testimony and documents of parties other than the appellants. The government also notes that since the appellants included eight different persons, the court would have had to devise a procedure by which the grand jury testimony and documents of each appellant were shielded from every other appellant. In view of these circumstances, the district court did not abuse its discretion here by resolving the matter *ex parte*.

B. The Propriety of the Rule 6(e) Order.

Appellants next argue that the order should be vacated both because the antitrust division did not demonstrate the particularized need required to authorize disclosure and because the disclosure authorized by the order was too broad.

Under rule 6(e)(3)(C)(i), a district court "is infused with substantial discretion" to order disclosure of grand jury testimony preliminarily to or in connection with a judicial proceeding. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). The Court has construed the rule, however, "to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *United States* v. *Sells Engineering, Inc.*, 103 S.Ct. 3133, 3148 (1983). " '[D]isclosure is appropriate only in those cases where the

need for it outweighs the public interest in secrecy * * *' ". *Id.* (quoting *Douglas Oil Co.*, 441 U.S. at 223).

The particularized need standard governs disclosure to the government as well as to private parties. *Id.* Nevertheless, a court need not pretend "that there are no differences between governmental bodies and private parties." *Id.* at 3149. The particularized need standard is a highly flexible one, and may accommodate "relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case." *Id.*

For example, disclosure to another division of the justice department probably poses "less risk of further leakage or improper use than would disclosure to private parties or the general public." *Id.* Further, since the grand jury investigation had terminated in this case at the time the antitrust division sought disclosure, some of the policies underlying grand jury secrecy—such as a fear that someone might attempt to corrupt witnesses or grand jurors—were no longer applicable. *See Douglas Oil Co.*, 441 U.S. at 219.

Nevertheless, even though these factors may weigh in favor of disclosure, the government must still make a threshold showing of particularized need. Judge Palmieri's order does not state that the antitrust division had made that showing, although he later stated, at the hearing on the motion to vacate the *ex parte* motion, that "the entire impact of the papers [the antitrust division] submitted were to show there was a particularized need", and that the government "went through a great deal of trouble to indicate why" they needed the order.

In its motion papers the antitrust division asserted that disclosure to the civil divisions of the justice department and the United States Attorney's office was necessary "to ensure that the Department acts consistently in its enforcement efforts * * * [,] to ensure that prosecution of this matter would carry out Department policy regarding

the False Claims Act", and to allow the antitrust division "to take full advantage of the Civil Division's expertise in enforcing cases under the False Claims Act." The government elaborated that

> Coordination between the Civil Divisions and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts if its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other divisions. This uniformity of enforcement is necessary not only to the Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

In evaluating a claim of particularized need, the district court " 'may weigh the public interest, if any, served by disclosure to a governmental body' ". *Sells Engineering*, 103 S.Ct. at 3149 (quoting *Abbott & Associates, Inc.*, 103 S.Ct. 1356, 1362 n.15 (1983)). But the mere invocation of a "public interest" will not necessarily meet the heavy burden imposed by the particularized need standard. Thus, the government must do more than argue that disclosure is warranted because the grand jury materials sought are "rationally related to [a] civil fraud suit to be brought by the Civil Division", *id.*, or that such a suit is in furtherance of its "responsibility to protect the public weal", *id.* at 3148. Similarly, general goals such as "enhancing federal-state cooperation in antitrust enforcement, and encouraging more state lawsuits against price-fixers" are not sufficient to establish the requisite particularized need. *Illinois* v. *Abbott & Associates, Inc.*, 103 S.Ct. at 1364 (1983).

Here, the reasons advanced by the antitrust division for disclosure to the civil division are perhaps more compelling on their face than those advanced in *Sells* and *Abbott*. But their import is diminished by the fact that the antitrust division could have provided the civil division with substantially the same information, without resorting to the disclosure of grand jury material. *See Sells Engineering*, 103 S.Ct. at 3149 (district court might take into account the sufficiency of alternative discovery tools available to the agency seeking disclosure). The antitrust division has broad precomplaint *ex parte* discovery powers under the antitrust civil process act, 15 U.S.C. § 1311, that are similar in many respects to a grand jury's powers. For example, the antitrust division may

> request the production of any documentary material, answers to written interrogatories or oral testimony which it has reason to believe is relevant to a civil antitrust investigation * * *. Moreover, ACPA's legislative history indicates that the Justice Department is to be given wide latitude when issuing CID's. Although the permissible scope of CID provisions is governed by either the grand jury subpoena standard or the civil discovery standard, * * * the House report accompanying the 1976 amendments to ACPA reveals a preference for the less stringent grand jury subpoena standard * * *.

Associated Container Transportation (Australia) Ltd. v. *United States*, 705 F.2d 53, 58 (2d Cir. 1983) (citations and footnote omitted).

Although the civil division lacked these broader discovery powers, the antitrust division could have furnished the civil division with information gathered under the provisions of the ACPA. *See* 15 U.S.C. § 1313(c)(2) (authorizing disclosure of CID material to duly authorized employees of the Department of Justice).

The antitrust division asserts that access to CID materials alone would not have provided the civil division with sufficient information to ensure that a civil suit was appropriate, since the civil division needed to review the antitrust division's fact memoranda, which quoted extensively from grand jury transcripts. But given the antitrust division's ability under the ACPA to require oral testimony or answers to written interrogatories, it should have been able to construct equally illuminating fact memoranda without disclosing grand jury materials.

We recognize that requiring the antitrust division to ask the appellants for information through the ACPA, when the appellants have already produced that information in response to the grand jury subpoena, entails a certain amount of duplication. In some situations, however, all the antitrust division need do is reformulate subpoena requests into CIDs requesting production of the same material. In other cases, such as when the antitrust division seeks oral testimony duplicative of that given before the grand jury, a substantial amount of additional government time and effort may be required. But such a factor can play no part in our analysis. As stated by the Supreme Court in *Sells*:

> Of course, it would be of substantial help to a Justice Department civil attorney if he had free access to a storehouse of evidence compiled by a grand jury; but * * * [t]he civil lawyer's need is ordinarily nothing more than a matter of saving time and expense. * * * We have consistently rejected the argument that such savings can justify a breach of grand jury secrecy.

103 S.Ct. at 3142.

Our evaluation of the government's showing of particularized need is also influenced by the breadth of the court's order. The Supreme Court has "required that the showing of need for [grand jury material] be made 'with

particularity' so that 'the secrecy of the proceedings [may] be lifted discretely and limitedly.' " *Douglas Oil Co.*, 441 U.S. at 221 (quoting *United States* v. *Procter & Gamble Co.*, 356 U.S. 667, 683 (1958)). Here, the order simply provides that the antitrust division may disclose to the specified individuals "matters occurring before the grand jury". The government's motion papers are equally unrestricted. They request permission to disclose memoranda prepared by antitrust division attorneys, which include "a description and analysis of the evidence (both testimonial and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury." Although it appears from these papers that the government intends to disclose only part of the grand jury material, it is impossible to tell what part would be disclosed.

In short, the government did not meet its heavy burden of demonstrating a particularized need for the disclosure, and the district court should not have issued the rule 6(e) order. Although we cannot restore the secrecy that has already been lost, since the memoranda have already been presented to the civil division, we nevertheless vacate the order to prevent any further possible disclosure to the civil division.

II. *Use of the Grand Jury Materials in Civil Litigation.*

Appellants argue that the attorneys who conducted the grand jury investigation may not continue to use grand jury materials, without a rule 6(e) order, to litigate a civil case. The Supreme Court expressly left this question unresolved in *United States* v. *Sells Engineering, Inc.*, 103 S.Ct. 3133, 3141 n.15 (1983), where the Court rejected the government's argument that attorneys in the justice department's civil division, who had *not* conducted the

grand jury investigation, were entitled under rule 6(e)(3)(A)(i) to automatic disclosure of grand jury materials for use in preparing a civil suit against subjects of the grand jury investigation.

The issue presented here is more subtle. The threshold question is whether the continued access to grand jury materials by the attorneys who conducted the grand jury investigation—and worked with the materials during that time—even constitutes "disclosure". Assuming that only the two attorneys who actually worked on the grand jury investigation would have access to the grand jury materials in the civil phase of the dispute—when they will not be functioning as prosecutors—to characterize their continued access in the civil phase to the materials to which they had access in the criminal phase as disclosure within the meaning of rule 6(e) seems fictional at first glance. But the realities belie the apparent fiction. The testimony and documents here are voluminous, and we doubt that the two attorneys could independently recall the details of 250,000 pages of subpoenaed documents or the details of testimony by dozens of witnesses. Civil prosecution of the case would therefore invite them to refer repeatedly to the documents and transcripts of which they have prior knowledge and with which they may be partially familiar. Even when a criminal investigation has generated far fewer materials, any resort to these materials by the attorneys pursuing the civil matter to refresh their recollection as to documents or testimony to which they had access in the grand jury proceeding is tantamount to a further disclosure. Viewed in this context, to permit them continued access to the materials is equivalent to "disclosure". *See id.* at 3137 n.6 (approving *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1187-88 (9th Cir. 1981) ("Each day this order remains

effective the veil of secrecy is lifted higher * * * by the continued access of those to whom the materials have already been disclosed.")).

That being so, the question then arises whether this type of disclosure requires a rule 6(e) order. Rule 6(e)(3)(A)(i) provides that disclosure otherwise prohibited by the provisions of rule 6(e) may be made to "an attorney for the government for use in the performance of such attorney's duty". While conceding that civil division attorneys fit within the definition of "attorney for the government"—as would the antitrust division attorneys here—the Court concluded in *Sells* that this subsection applied to the performance of the attorneys' duty to enforce the federal criminal law only and commented that disclosure for civil use without a rule 6(e) order was "unjustified by the considerations supporting prosecutorial access, [and] threaten[ed] to do affirmative mischief." *Sells Engineering, Inc.*, 103 S.Ct. at 3142.

The *Sells* Court required a rule 6(e) order because disclosure to government attorneys for civil use in that case presented three problems: (1) it threatened to undermine the integrity of the grand jury itself; (2) it threatened to subvert limitations imposed outside the grand jury context on the government's discovery powers; and (3) it raised many of the same concerns that underlie the rule of secrecy in other contexts. To determine whether a rule 6(e) order should be required in the present circumstances, we must analyze these three potential problems in the context of antitrust prosecutors who are seeking to proceed civilly.

1. Any possible threat to the integrity of the grand jury is largely absent in this case. In *Sells*, the Court reasoned that if prosecutors knew that their civil division colleagues would be free to use grand jury materials in a civil case, they might be tempted to manipulate the grand jury process to root out evidence for a civil case that would

be unnecessary in a criminal prosecution, or even to start a grand jury investigation where no criminal prosecution seemed likely.

This danger is substantially attenuated here in view of the antitrust division's extensive discovery powers under the antitrust civil process act, which the civil division lacked in *Sells*. The antitrust division would gain little by instigating a grand jury investigation for the purpose of gathering evidence for a civil proceeding, when it could gather that same information through its powers under the ACPA. Further, since a thoroughly prepared presentation to a grand jury in a criminal antitrust prosecution would probably uncover automatically most information that would be useful to a civil antitrust suit based on the same subject, there is little opportunity for the prosecutor to abuse grand jury investigations. And even though it is conceivable that some aspects of a civil case might require evidence different from what a prosecutor would seek for a criminal case, the prosecutor would also know that the antitrust division could seek this information through the ACPA if a civil suit were initiated. Under these circumstances, the threat to the integrity of the grand jury carries little weight.

2. The *Sells* Court's second concern was that automatic disclosure of grand jury materials threatened to subvert limitations on the government's powers of discovery and investigation that are applied outside the grand jury context. The Court commented that "[i]f government litigators or investigators in civil matters enjoyed unlimited access to grand jury material, * * * there would be little reason for them to resort to their usual, more limited avenues of investigation." *Id.* at 3143. Here, by contrast, the government's discovery powers under the ACPA are almost co-extensive with the grand jury's investigative powers.

We recognize that permitting the grand jury attorneys to use grand jury materials in a civil case would in effect give the government "exclusive access to a storehouse of relevant fact" which is closed to a civil defendant absent a showing of particularized need under rule 6(e). However, had the government collected the same information civilly under the ACPA, a similar limitation on the defendant's access would apply, for material obtained by the government under the ACPA may not be disclosed to third parties, other than duly authorized employees of the justice department, without the consent of the person who produced the material or from whom it was discovered. 15 U.S.C. § 1313(c)(3). Thus, we do not view either of the first two problems in *Sells* as reasons to require a rule 6(e) order here.

3. The Court's third concern in *Sells*, however, that disclosure to government bodies raises many of the same concerns that underlie the rule of grand jury secrecy in other contexts, carries significantly more weight in the circumstances of this case. First, in *Sells*, the Court noted that allowing automatic disclosure of grand jury materials to nonprosecutors for civil use increases the risk of illegal or inadvertent disclosure of such material to others. *Sells Engineering, Inc.*, 103 S.Ct. at 3142. If it only involved continued access by those antitrust division attorneys who actually carried out the grand jury investigation here, then the disclosure would admittedly be limited. But the risk of inadvertent or illegal disclosure arising from these attorneys' continuing access to the material is also significant. If the attorneys intend to use the testimony and documents in litigating the case, it borders on the unrealistic to assume that paralegal and secretarial staff and other necessary assistants would not also come into contact with the material. Indeed, counsel very likely have already used such assistants in preparing and releasing to the civil division the fact memoranda, memoranda

which contained "a description and analysis of the evidence (both testimonial and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury." Even though these support employees may have worked on the grand jury investigation and previously seen the grand jury material, it is still being disclosed to them in the sense that they have continued access to it. But since disclosure to nonattorney government personnel is expressly limited to disclosure for the purpose of assisting "an attorney for the government in the performance of such attorney's duty to enforce federal *criminal* law", Fed. R. Crim. P. 6(e)(3)(A)(ii) (emphasis added), even such limited disclosure would contravene the statute. Moreover, given the long life and complexity of many civil antitrust actions, it seems probable that some new support personnel will need to work on some aspect of the case, due either to employee turnover or to increased staffing needs. Any attendant disclosure to those new employees would also contravene rule 6(e)(3)(A)(ii). Finally, any such disclosure, even if not in itself in violation of the statute, would increase the risk of inadvertent disclosure to nongovernment personnel.

Second, the Supreme Court was also concerned that routine, automatic disclosure would create a risk that a witness, who knew that his testimony could be used in civil litigation, might be less willing to speak candidly before the grand jury "for fear that he [would] get himself into trouble in some other forum." *Sells Engineering*, 103 S.Ct. at 3142. This concern applies with equal force to grand jury investigations by the antitrust division.

On balance, we think that the threat of affirmative mischief posed by the use of grand jury materials in this civil action is somewhat less than that present in *Sells*, and we might be tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material

to litigate this civil action. But, however minimal the threat here, we are directed by the principle that "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand jury] secrecy has been authorized." *Sells Engineering*, 103 S.Ct. at 3138. Certainly, such a clear indication is lacking here. Consequently, the reluctance imposed on us from above forces us to reinforce the principle of grand jury secrecy and requires, through a rule 6(e) order, judicial supervision of access to grand jury material by the antitrust division in this civil action.

Since the complaint filed by the government does not quote from or refer to any grand jury material, and since the statute of limitations on at least one of the government's claims has apparently run, we grant the appellants' request for protective relief only to the extent that we prohibit any further access to or use of grand jury materials by the antitrust division in the pending civil action, unless and until the antitrust division obtains a rule 6(e) order based on an appropriate showing of "particularized need" for use of the material.

Appellants state that "this case does not present the more difficult question of whether a prosecutor who conducted the grand jury proceedings may merely use his recollection of facts from those proceedings to litigate a civil case." Since it would be almost impossible for any attorney in such a position to compartmentalize his thoughts and litigate a civil case without in some way using his recollection of facts learned during the grand jury investigation, we think that the real question is whether the prosecutor must be disqualified from litigating the civil case. Since appellants have expressly declined to present that issue, we are not called upon to address it.

CONCLUSION

We reverse the district court's denials of both the motion to vacate the rule 6(e) order and the motion to enjoin the antitrust division from any further access to or use of the grand jury materials in the civil action. We remand to the district court with a direction to grant both motions as indicated in this opinion, but without prejudice to a further application for a rule 6(e) order based on an appropriate demonstration of particularized need.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 85-8026

IN RE GRAND JURY INVESTIGATION (TALLOW)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of March, one thousand nine hundred and eighty five.

Present: Honorable IRVING R. KAUFMAN,
Honorable RICHARD J. CARDAMONE,
Circuit Judges,
Honorable CHARLES H. TENNEY,
District Judge, sitting by designation.

A motion having been made for a protective order pending appeal and an expedited appeal;

IT IS HEREBY ORDERED that the motion for a protective order prohibiting the United States from filing its complaint on March 15 1985 be denied. The appeal from the November 30, 1984 order, pursuant to Fed. R. Crim. P. 6(e), authorizing disclosure of grand jury materials to certain government attorneys, is expedited to the week of April 8, 1985; the Clerk's office shall enter an appropriate scheduling order.

IT IS FURTHER ORDERED that the complaint be sealed upon its filing with the Clerk of the district court, and until such time as the appeal from the Rule 6(e) order is decided by this Court. No party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not now privy to such information. This prohibition shall remain in effect pending issuance of this Court's mandate in the appeal from the Rule 6(e) order.

SO ORDERED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,

/s/ RICHARD J. CARDAMONE
Richard J. Cardamone,
Circuit Judges,

/s/ CHARLES H. TENNEY/JOS
Charles H. Tenney,
District Judge.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GRAND JURY INVESTIGATION

APPLICATION FOR ORDER TO SHOW CAUSE AND PROTECTIVE ORDER PURSUANT TO RULE 6(e), FED. R. CRIM.P. and AFFIDAVIT

GRAND & OSTROW
641 Lexington Avenue
New York, N.Y. 10022
212-832-3611

Attorneys for Petitioners
JOHN DOE I, JOHN DOE II, JOHN DOE INC. I

Applications for vacatur and protective relief denied without prejudice to their renewal before the trial judge expected to be assigned when case is filed on March 15, 1985. See record of March 12, 1985.

SO ORDERED.

/s/ EDMUND L. PALMIERI
Edmund L. Palmieri
U.S.D.J.

March 12, 1985

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

ORDER OF JUDGE EDMUND PALMIERI, NOVEMBER 30, 1984

ORDER

On November 30, 1984, the U.S. Department of Justice filed a motion for disclosure under Federal Rule of Criminal Procedure 6(e) in reference to the above-captioned investigation.

Upon consideration of the memorandum and papers filed in this matter

IT IS ORDERED that the motion of the U.S. Department of Justice be granted and that matters occurring before the grand jury may be disclosed to.

Stuart E. Schiffer
Deputy Assistant Attorney General
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Michael F. Hertz, Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Robert L. Ashbaugh, Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Howard Sribnick, Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Rudolph W. Giuliani
U.S. Attorney
Southern District of New York

Howard Wilson, Chief
Civil Division
U.S. Attorneys Office
Southern District of New York

or to any attorney of the Civil Division of the U.S. Department of Justice or the U.S. Attorneys Office for the Southern District of New York who may be designated by any of the afore-named attorneys to assist in the review of this matter provided that this information will be treated as confidential and its use will be limited solely to the purposes of this order.

IT IS FURTHER ORDERED that the Court shall be notified promptly of any such designation by means of a letter of disclosure to the Court.

IT IS FURTHER ORDERED that this Order and accompanying application be sealed until further order of the Court.

/s/ EDMUND L. PALMIERI
UNITED STATES DISTRICT JUDGE

Date: Nov. 30, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 85-6054

IN RE: GRAND JURY INVESTIGATION
JOHN DOE I, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of December one thousand nine hundred and eighty-five.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee, United States of America

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20167

No. 85-1613 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOHN DOES I, II, III, IV, V and
JOHN DOES, INC., I, II and III,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Of Counsel:

THEODORE V. WELLS, JR., ESQ.
Lowenstein, Sandler, Brochin,
Kohl, Fisher, Boylan & Meanor
65 Livingston Avenue
Roseland, N.J. 07052
201-992-8700
Counsel for John Doe, Inc. II

PAUL R. GRAND
DIANA PARKER
Counsel of Record
Grand & Ostrow
641 Lexington Avenue
New York, New York 10022
212-832-3611
Counsel for John Does I and II and John Doe, Inc. I

WALTER SURREY, ESQ.
Counsel of Record
Jones, Day, Reavis & Pogue
(Surrey & Morse)
1250 Eye Street, N.W.
Washington, D.C. 20005
202-682-4000
Counsel for John Does III, IV and V and John Doe, Inc. III

11pp

Parties to the Proceeding

Respondents are five individuals who were witnesses before the grand jury and three corporations whose documents were subpoenaed by the grand jury.*

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* The stock of each of the three corporations as well as the stock of the parent of the only corporation that has a parent or a subsidiary is privately held.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1613

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOHN DOES I, II, III, IV, V and JOHN DOES, INC., I, II and III,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

In November 1981, the Agency for International Development of the Department of State notified the Antitrust Division of the Department of Justice that certain conduct by American companies might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq*. In March 1982, the Antitrust Division commenced a grand jury investigation; no civil investigation was begun. (Petition at 4) The grand jury investigation continued until the eve of its expiration date, June 8, 1984, although the attorneys for respondents repeatedly questioned whether the acts in issue were within the subject matter jurisdiction of the Sherman Act. In June 1984,

the Antitrust Division informed respondents that the grand jury would not be asked to return any indictments. At the same time, the Antitrust Division instructed the same attorneys who had conducted the grand jury investigation to begin considering filing a civil lawsuit. (*See* App. to Petition at 2a)

On March 6, 1985 the Antitrust Division informed respondents that on November 30, 1984, it had obtained, without notice, an *ex parte* order authorizing disclosure of grand jury materials to the Civil Division. On March 12, 1985, the Antitrust Division informed respondents that it would file a civil complaint based on grand jury materials, and the District Court permitted respondents to see the prior *ex parte* order. On that same date, the District Court denied respondents' applications for vacatur of the *ex parte* order and for protective relief. (App. to Petition at 21a)

On March 15, 1985, the Second Circuit Court of Appeals ordered sealed the complaint expected to be filed by the Antitrust Division on that date and ordered that "[n]o party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not now privy to such information." (App. to Petition at 20a) This prohibition remains in effect.

On September 24, 1985, the Second Circuit reversed the *ex parte* Rule 6(e) order and granted the motion to enjoin the Antitrust Division from any further access to or use of the grand jury materials in the civil action. The Second Circuit declined to dismiss the complaint, even though based on grand jury materials, on the ground that the statute of limitations on at least one of the Government's claims had run and the complaint did not specifically quote grand jury materials. (App. to Petition at 17a-18a)

ARGUMENT

None of the usual reasons for granting certiorari are present in this case. No federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter and no important question of federal law which has not been, but should be, settled by this Court is at issue. *See* Rule 17, Rules of the Supreme Court of the United States.

Use of Grand Jury Materials in Civil Litigation

Only two courts of appeals have addressed the issue of whether an attorney of the Antitrust Division of the Department of Justice who has had access to grand jury materials while conducting a criminal investigation may use the same materials in preparing and litigating a civil case without obtaining a disclosure order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. Both courts of appeal concluded that such attorneys may not use grand jury materials to litigate civil cases without obtaining a Rule 6(e) order. *United States* v. *Archer-Daniels-Midland*, No. 85-1050, Slip. Op. at 14 (8th Cir. Feb. 24, 1986); *United States* v. *John Doe I, Inc.*, 774 F.2d 34 (2nd Cir. 1985) (App. to Petition at 1a). Thus, no conflict in the circuit courts requires this Court's review.

No important question of federal law that has not been but should be decided by this Court is raised in this case. The only difference between the instant case and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), is that in *Sells*, Department of Justice Civil Division attorneys wanted to use grand jury materials for the purpose of preparing and litigating a civil lawsuit, while in this case Department of Justice Antitrust Division attorneys wish to do so. The Second Circuit held only that Antitrust Division attorneys, like other attorneys, must obtain a Rule 6(e) order before using grand jury materials to prepare and litigate civil cases.

The Antitrust Division has forthrightly conceded that it has no need to use grand jury materials to prepare and litigate this civil case. Instead, the Antitrust Division has argued that "the 'temptation' to abuse the grand jury that worried the *Sells* Court does not exist in the context of the Antitrust Division's enforcement of the Sherman Act, given the broad investigative powers provided by the Antitrust Civil Process Act, 15 U.S.C. 1311-1314." (C.A. Gov't Br. at 40) In its Petition, the Government argues not that the Antitrust Division needs grand jury materials to litigate civil cases but that obtaining the same information through civil discovery is "costly and time-consuming." (Petition at 15; *see* 16).

If the Antitrust Division does not need to use grand jury materials because of its broad pre-litigation investigative powers, it should not be permitted to do so merely to save "time and expense." This Court has "consistently rejected the argument that such savings can justify a breach of grand jury secrecy." *Sells*, 463 U.S. at 427. "Indiscriminate lifting of the veil of secrecy from the grand jury will forever destroy the effectiveness of the grand jury as an investigative body. . . ." *Lucas* v. *Turner*, 725 F.2d 1095, 1109 (7th Cir. 1984).

Likewise, if the Antitrust Division merely prefers to use grand jury transcripts to litigate civil cases because grand jury testimony is taken without counsel present (while under 15 U.S.C. §§ 1311-14 a witness has a right to counsel and counsel can raise objections to questions), that argument must also be rejected. The purposes of grand jury secrecy include "an interest in protecting witnesses both from retaliation and from undeserved public obloquy when they are haled before the grand jury and questioned vigorously, maybe even browbeaten, without counsel present . . . ." *Illinois* v. *F.E. Moran, Inc.*, 740 F.2d 533, 540 (7th Cir. 1984).

For these reasons, the Second Circuit correctly held that, like other attorneys, attorneys of the Antitrust Division may not use grand jury materials to prepare and litigate a civil case without obtaining a Rule 6(e) order. That holding presents no important question for review.

The Ex Parte Rule 6(e) Order

The second question presented by this case is also not one that needs to be reviewed by this Court. The District Court granted an *ex parte* Rule 6(e) order authorizing the Antitrust Division to disclose the full scope of the grand jury investigation to unspecific numbers of attorneys in the Civil Division and the United States Attorney's Office in order to obtain their advice and ensure consistent federal enforcement of the False Claims Act. (App. to Petition at 22a-23a)

General and legitimate law enforcement goals do not constitute particularized need. *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 572 (1983). Blanket disclosure is also not authorized by law. *Abbott*, 460 U.S. at 568. For these two reasons, the Second Circuit correctly held that the disclosure ordered by the District Court in this case was not permissible under Rule 6(e). (*See* App. to Petition at 8a, 10a-11a)

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Dated: New York, N.Y.
April 28, 1986

Respectfully submitted,

PAUL R. GRAND
DIANA PARKER
Counsel of Record
Grand & Ostrow
641 Lexington Avenue
New York, New York 10022
212-832-3611
Counsel for John Does I and II and John Doe, Inc. I

WALTER SURREY, ESQ.
Counsel of Record
Jones, Day, Reavis & Pogue
(Surrey & Morse)
1250 Eye Street, N.W.
Washington, D.C. 20005
202-682-4000
Counsel for John Does III, IV and V and John Doe, Inc. III

Of Counsel:

THEODORE V. WELLS, JR., ESQ.
Lowenstein, Sandler, Brochin,
Kohl, Fisher, Boylan & Meanor
65 Livingston Avenue
Roseland, N.J. 07052
201-992-8700
Counsel for John Doe, Inc. II

No. 85-1613 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE INC. I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

PAUL R. GRAND
DIANA PARKER
Grand & Ostrow
641 Lexington Avenue
New York, New York 10022
(212) 832-3611
Counsel for John Does I and II and John Doe, Inc. I

WALTER SURREY, ESQ.
Jones, Day, Reavis & Pogue
(Surrey & Morse)
1250 Eye Street, N.W.
Washington, D.C. 20005
(202) 682-4000
Counsel for John Does III, IV and V and John Doe, Inc. III

THEODORE V. WELLS, JR., ESQ.
Lowenstein, Sandler, Brochin
Kohl, Fisher, Boylan & Meanor
65 Livingston Avenue
Roseland, New Jersey 07052
(201) 992-8700
Counsel for John Doe, Inc. II

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED MARCH 31, 1986
CERTIORARI GRANTED MAY 27, 1986

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1613

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE INC. I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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* The opinion of the court of appeals and one of the orders of the district court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced herein.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL DOCKET CONTINUATION SHEET

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
3/12/85	1704	IN RE: GRAND JURY INVESTIGATION: Fld Application for an Order to Sho[w] Cause and Protective Order . . . and Memo of Law in support of application.
3/12/85		IN RE: GRAND JURY INVESTIGATION: Fld. MEMO ENDORSED: Application for vacatur and protective relief denied without prejudice to their renewal before the trial judge expected to be assigned when case is filed on March 15, 1985. SO ORDERED: PALMIERI J. 3-12-85
3/13/85	1721	IN RE: GRAND JURY INVESTIGATION: Fld Notice of Appeal by John Does Inc. I, II, and III from the order of Judge Palmieri entered on March 12, 1985. Mailed copies.
3/13/85	1722	IN RE: U.S. DEPT OF JUSTICE- CIVIL DIVISION—* * *: Fld. TRANSCRIPT on RECORD of PROCEEDINGS. DATED, 3-12-85, BEFORE Judge C.L. Brieant, USDJ
3/13/85	1723	IN RE: U.S. DEPT. OF JUSTICE—* * *: FLD. TRANSCRIPT on RECORD of PROCEEDINGS, dated 3-12-85, before Judge CL Brieant, USDJ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET No. 85-6054

IN RE:
GRAND JURY INVESTIGATION
JOHN DOES, I, II, III, IV, V AND JOHN DOES, INC.,
I, II AND III,
APPELLANTS,

v.

UNITED STATES OF AMERICA,
APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	FILINGS–PROCEEDINGS
BFM 3-13-85	Movants JOHN DOE I, II & JOHN DOE INC I, Notice of Motion for Protective Order Pending Appeal, FILED.
BFM 3-13-85	Movants JOHN DOE I et al Notice of Motion for Expedited Appeal, FILED.
BFM 3-13-85	Movants DOE Memorandum of Law in Support of Motions filed 3-13-85, RECEIVED.
BFM 3-13-85	Copy of district court docket entries and Notice of Appeal on behalf of the Appellants JOHN DOES I, II, III, IV, V and JOHN DOES INC I, II & III, FILED.
BFM 3-14-85	Copy of receipt re: payment of the docketing fee in the district court, FILED.
BFM 3-14-85	Appellee USA Memorandum in Opposition to the Appellants[']] Motion for protective order/expedited appeal, FILED.

DATE	PROCEEDINGS
BFM 3-15-85	Order that the motion for a protective order prohibiting the United States from filing its complaint on March 15, 1985 be denied and further noting that the appeal from the November 30, 1984 order, pursuant to Fed. R. Crim. P.6(e), authorizing disclosure of grand jury materials to certain government attorneys, is expedited to the week of April 8, 1985; the Clerk[']s office shall enter an appropriate scheduling order and further ordering that the complaint be sealed upon its filing with the Clerk of the district court, and until such time as the appeal from the Rule 6(e) order is decided by this Court. No party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not privy to such information. This prohibition shall remain in effect pending issuance of this Courts mandate in the appeal from the Rule 6(e) order, FILED. (By IRK, RJC, cjj, CHT, dj)
BFM 3-15-85	Certified copy of the order filed on 3-15-85 issued to the district court. (SDNY).
BFM 3-15-85	SDNY receipt of Order, filed on 3-15, RECEIVED.
BFM 3-15-85	Appellee USA Memorandum to the Court, FILED.

	DATE	PROCEEDINGS
BFM	3-19-85	Scheduling Order #1 (EXPEDITED) FILED.
GH	3-21-85	Form C on behalf of JOHN DOES and JOHN DOES INC filed, pfs
	3-21-85	Form D on behalf of JOHN DOES and JOHN DOES INC FILED
jc	3-22-85	Record on appeal filed (original papers of district court)
jc	3-26-85	Appellants brief filed w/ps*
jc	3-26-85	Appellants joint-appendix filed w/ps*
jed	4-3-85	Appellee USA motion for leave to file supplemental appendix & leave to file brief & supplemental appendix under seal filed
jed	4-3-85	Appelle brief and supplemental appendix received
jed	4-3-85	Appellant John Does I, II and John Does, Inc I affidavit in opposition & response to motion of appellee USA filed.
jed	4-3-85	Appellee reply to appellants' affidavit in opposition to motion for leave to file supplemental appendix & leave to file under seal (brief & supp appendix) filed
jed	4-3-85	Order granting appellee motion for leave to file supplemental appendix & leave to file brief & supplemental appendix under seal filed
jed	4-3-85	Appellee brief & supplemental appendix filed (sealed)
MJ	4-4-85	Appellants reply brief filed w/pfs.
KG	4-9-85	Case heard before: Kearse, Pierce and Pratt, CJJ.

	DATE	PROCEEDINGS
jc	9-24-84	Judgment Reverse and Vacate the Rule 6(e) order, and grant the protective relief requested by the appellants, published signed opinion filed (GCP)
jc	9-24-85	Judgment filed
jc	10-8-85	Appellee (USA) motion for extension of time to file petition for rehearing filed w/ps
lmc	10-7-85	Appellants['] itemized & verified bill of cost received (w/pfs)
lmc	10-18-85	Order granting Appellee (USA) motion for 14 day extension of time to file petition for rehearing to *October 21, 1985* filed (endorsed on motion filed 10-8-85)
MJ	10-21-85	Appellee USA motion for extension of time to and through 10-31-85 to seek rehearing filed w/pfs.
MJ	10-31-85	Appellee USA petition for rehearing with suggestion for rehearing en banc *received.*
MJ	11-1-85	Order granted Appellee USA motion for extension of time to and through Oct. 31, 1985 to seek rehearing filed. (ALK, LWP, GCP)
MJ	11-1-85	Appellee USA petition for rehearing with suggestion for rehearing en banc filed w/pfs.
MJ	12-2-85	Order denied appellee USA petition for rehearing with suggestion for rehearing en banc filed. (E.B.G.)
jc	12-9-85	Appellants['] statement of costs filed
jc	12-12-85	Mandate Issued (opinion, judgment and statement of costs)

	DATE	PROCEEDINGS
MJ	4-7-86	Notice of filing of petition for writ of certiorari filed. (S.C. #85-1613)
mjf	5-27-86	Certified copy of order of the Supreme Court granting petition for writ of certiorari filed

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

MOTION OF THE UNITED STATES FOR AN ORDER UNDER RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The United States, through the Antitrust Division of the U.S. Department of Justice, respectfully requests the Court to issue an Order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure authorizing disclosure of grand jury material arising from the Grand Jury empanelled in this District on December 14, 1982 to:

Stuart E. Schiffer
Deputy Assistant Attorney General
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Michael F. Hertz, Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Robert L. Ashbaugh, Assistant Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Howard Sribnick, Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Rudolph W. Giuliani
U.S. Attorney
Southern District of New York

Howard Wilson, Chief
Civil Division
U.S. Attorneys office
Southern District of New York

or to any attorney of the Civil Division of the U.S. Department of Justice or the U.S. Attorneys Office for the Southern District of New York who may be designated by any of the afore-named attorneys to assist in the review of this matter. The Court shall be notified promptly of any such designation by means of a letter of disclosure to the Court.

In support of this Motion, the Government relies on the arguments made in the accompanying Statement of Points and Authorities and the affidavit of Anna Swerdel and further states as follows:

1. The contents of the material to be reviewed by the afore-named individuals may include "matters occurring before the grand jury." Fed. R. Crim. P. 6(e).

2. Authority to disclose is requested "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).

3. There is particularized need for the disclosure.

Since this application discloses the existence and general nature of a grand jury investigation, we respectfully request that this application and order be sealed until further order of the Court.

Respectfully submitted,

CHARLES S. STARK,
Attorney
Department of Justice

CRAIG W. CONRATH,
Attorney
Department of Justice

/s/ ANNA SWERDEL
Anna Swerdel

/s/ CAROLYN G. MARK
Carolyn G. Mark
Attorneys
Antitrust Division
Department of Justice
Washington, D.C. 20530
(202) 633-2519

Date:

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF THE UNITED STATES FOR AN ORDER UNDER RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Antitrust Division of the U.S. Department of Justice has been investigating whether violations of the Sherman Act were committed by corporations and their employees or agents by illegally fixing prices and rigging bids with regard to sales of tallow to the Government of Egypt in transactions financed by the United States Agency for International Development. The grand jury empanelled in this district on December 14, 1982 heard testimony and received documents in this investigation. The grand jury's term expired on June 13, 1984.

On June 8, 1984 the Antitrust Division decided not to seek the return of indictments by the grand jury. The Sherman Act may be enforced by criminal or civil action. The staff attorneys responsible for conducting the grand jury investigation were instructed to continue the investigation as a civil matter. The Antitrust Division currently is considering whether to bring a civil action, based on the evidence obtained in the course of its grand jury investigation, alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 3729-3731 of the False Claims Act, 31 U.S.C. §§ 3729-3731, and Section 640A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2399b.

Although the Antitrust Division is authorized to prosecute conduct in violation of the False Claims Act that also violates the antitrust laws, the Civil Division of the U.S. Department of Justice is charged with the primary responsibility for enforcing the False Claims Act. 28 C.F.R. §§ 0.40(a), 0.45(d). To ensure uniform and fair enforcement of the False Claims Act, the Antitrust Division wishes to obtain the advice of the Civil Divisions of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York regarding the merits of a False Claims Act case in this matter. In order to take full advantage of the expertise of these Divisions, the Antitrust Division proposes to disclose to these Divisions certain materials which describe the conduct at issue. The materials to be reviewed contain references to grand jury testimony and documents produced to the grand jury. Thus, the Divisions' review of the materials will involve the disclosure of matters that occurred before the grand jury. The Antitrust Division, therefore, seeks an Order from this Court under Federal Rule of Criminal Procedure 6(e)(3)(c)(i) to allow the disclosure of matters occurring before the grand jury to Stuart E. Schiffer, Deputy Assistant Attorney General, Commercial Litigation Branch, Civil Division, Michael F. Hertz, Director of the Commercial Litigation Branch, Civil Division, Robert L. Ashbaugh, Assistant Director of the Commercial Litigation Branch, Civil Division, Howard Sribnick, Trial Attorney, Commercial Litigation Branch, Civil Division, Rudolph W. Giuliani, U.S. Attorney, Southern District of New York, Howard Wilson, Chief, Civil Division, U.S. Attorneys Office, Southern District of New York, or to any attorney of the Civil Division of the U.S. Department of Justice or the U.S. Attorneys Office, Southern District of New York, who may be designated by any of the aforenamed attorneys to assist in the review of this matter.

A. The Information To Be Disclosed May Include Matters That Occurred Before The Grand Jury

The information to be disclosed includes a description and analysis of the evidence (both testimoniai and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury. Accordingly, the disclosure may include matters occurring before grand jury. *Index Fund, Inc.* v. *Hagopian*, 512 F. Supp. 1122 (S.D.N.Y. 1981). The issuance of a Rule 6(e) Order by this Court, therefore, may be necessary to prevent a violation of Fed. R. Crim. P. 6(e).

B. The Antitrust Investigation is Currently At The Stage Of Being "Preliminary To Or In Connection With A Judicial Proceeding"

Subsection (3)(c)(i) of Fed. R. Crim. P. 6(e) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made when so directed by a court preliminary to or in connection with a judicial proceeding."

The Supreme Court in *United States* v. *Baggot*, ____ U.S. ____, 103 S. Ct. 3164 (1983), specifically left open the question whether an "investigation" undertaken by a government agency would always be preliminary to a judicial proceeding if the only recourse available to the agency once it uncovers a violation of law is to initiate litigation.[1] 103 S. Ct. at 3168. In addition, the Court explicitly declined to "address how firm an agency's decision to litigate must be before its investigation can be characterized as preliminary to a judicial proceeding." 103 S. Ct. at 3168 n.6. In so declining, however, the Court implied that an investigation, at some stage, may be considered "preliminary to or in connection with a judicial proceeding." *Id*. This investigation is at a stage where it properly can be viewed as preliminary to a judicial proceeding.

[1] Any enforcement action taken by the Division lies in the federal district courts. 15 U.S.C. § 4.

The staff attorneys have completed their investigation in the above-captioned matter. They have prepared memoranda recommending proposed enforcement actions for the Division to take. Swerdel Affidavit at ¶ 8. The Division must now decide whether or not to approve the staff attorneys' recommendation. The disclosure of information to attorneys in the Civil Divisions of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York is necessary to enable them to participate in the Antitrust Division's decision-making process as to the appropriateness of a False Claims Act case, and is not for purposes of further investigation by these Divisions. An affirmative decision by the Antitrust Division to file a case will result in a judicial proceeding. Thus, any disclosure to attorneys in these Divisions is preliminary to a judicial proceeding under Rule 6(e)(3)(c)(i).

C. There Is A Sufficient Showing Of Particularized Need For This Court To Allow Disclosure of Information By The United States

The Supreme Court in *United States* v. *Sells Engineering, Inc.*, ____ U.S. ____, 103 S. Ct. 3133 (1983) reiterated that Fed. R. Crim. P. 6(e) requires a showing of particularized need for grand jury materials before any disclosure will be permitted. 103 S. Ct. at 3148. Citing *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), the Court stated that parties seeking disclosure must show that "the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only materials so needed." *Id*. at 3148.

a. The need for disclosure outweighs the need for secrecy

The need for disclosure in this situation is greater than the need for continued secrecy. *Douglas Oil, supra*, identified four reasons for secrecy: the protection of witnesses from retribution by those against whom they testify, the prevention of improper influence of grand jurors by the subjects under investigation, the preclusion of the possibility that those about to be indicted may flee, and the protection of those who may be accused, but later exonerated, from public ridicule. 441 U.S. at 219. These concerns are not relevant here where the disclosure is to be made to attorneys of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York who will not disclose further the information.

On the other hand, the reasons supporting disclosure are substantial. The disclosure of information is necessary to ensure the proper functioning of the decision-making process of the U.S. Department of Justice. In order properly to exercise its prosecutorial discretion, review of the memoranda by the Civil Divisions is necessary to ensure that the Department acts consistently in its enforcement efforts. The review is also important to ensure that prosecution of this matter would carry out Department policy regarding the False Claims Act. Moreover, without disclosure of this information, the Antitrust Division would not be able to take full advantage of the Civil Divisions' expertise in enforcing cases under the False Claims Act.

Coordination between the Civil Divisions and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts it its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other Divisions. This uniformity of enforcement is necessary not only to the

Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

b. There has been no abuse of the grand jury process

The Supreme Court in *Sells* also was concerned with the potential for prosecutorial abuse of the grand jury process. The Court feared that the broad scope of grand jury powers might be improperly used to obtain evidence for use in a civil suit. 103 S. Ct. at 3142-3143. The grand jury investigation in this matter was, at all times, conducted in good faith. At no time was the grand jury used to gather evidence for a civil case; its sole purpose was to determine whether there existed potential criminal liability on the part of the subjects of the investigation.

The antitrust laws may be enforced by criminal or civil action. At the beginning of an investigation, the Antitrust Division evaluates whether the conduct to be investigated is of the type that it normally prosecutes criminally. If so, it will authorize a grand jury investigation. Otherwise, the Antitrust Division will rely on the broad civil investigative powers afforded by the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314.[2] With these civil investigative powers available to the Antitrust Division, there is no reason for it to use a grand jury to gather evidence for a civil case.

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[2] Under the Antitrust Civil Process Act the Division can issue Civil Investigative Demands which compel a witness or corporation:

(1) to produce documents to the government;
(2) to give oral testimony under oath; and
(3) to respond, in writing, to written interrogatories.

15 U.S.C. § 1312(a), (g), (h), (i)(l).

The grand jury in this matter investigated and uncovered evidence of price fixing and bid rigging. The Antitrust Division routinely prosecutes such conduct criminally. Nevertheless, on June 8, 1984, the Antitrust Division, exercising its prosecutorial discretion and in light of the specific facts obtained in the course of the investigation, determined not to seek indictments but to proceed by civil action. Swerdel Affidavit at ¶¶ 5, 6. Therefore, at all times the grand jury investigation was conducted with the good faith belief that the activity being investigated was appropriate for criminal sanctions.

After the Antitrust Division decided to proceed by civil investigation on June 8, 1984, the staff attorneys conducted no further investigation using the powers of a grand jury. In accordance with Antitrust Division practice, the Assistant Attorney General for the Antitrust Division, J. Paul McGrath, invoked the Antitrust Division's civil investigative powers to continue its investigation. There has been no misuse of the grand jury.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that its Motion for an Order permitting disclosure of grand jury matters, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, be granted.

Respectfully submitted,

CHARLES S. STARK
Department of Justice

/s/ ANNA SWERDEL
Anna Swerdel

CRAIG W. CONRATH
Department of Justice

/s/ CAROLYN G. MARK
Carolyn G. Mark
Attorneys
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2519

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

AFFIDAVIT OF ANNA SWERDEL

Anna Swerdel, being first duly sworn, states that the following is true and correct:

1. I am an attorney employed by the Antitrust Division of the United States Department of Justice and am a member of the Bar of the District of Columbia. I make this affidavit in support of the Motion of the United States for Disclosure of Grand Jury Material under Rule 6(e) of the Federal Rules of Criminal Procedure.

2. Investigations of the Antitrust Division are conducted by staff attorneys assigned to various sections within the Antitrust Division. I am assigned to the Foreign Commerce Section of the Antitrust Division.

3. In March 1982, I received authority to conduct a grand jury investigation in the Southern District of New York into possible violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, one of the federal antitrust laws. I was the lead attorney assigned to this investigation. Specifically, the grand jury investigated the possibility of collusion with regard to sales of tallow to the Government of Egypt. These sales were made by suppliers of tallow in the United States and were funded by the Agency for International Development ("AID") of the U.S. Department of State.

4. Subpoenaed documents subsequently were transferred by Order of this Court to the Grand Jury empanelled in this district on December 14, 1982 ("the

December 14, 1982 Grand Jury"). The December 14, 1982 Grand Jury heard testimony and subpoenaed additional documents.

5. After review of the grand jury material, on June 8, 1984, the Antitrust Division decided not to seek any indictments. The term of the December 14, 1982 Grand Jury expired on June 13, 1984.

6. Concurrent with the decision not to seek any indictments, the staff attorneys were instructed to continue the investigation as a civil matter. We have done so.

7. Upon completion of an investigation, civil or criminal, the staff recommends possible prosecutorial actions to its supervisors. The staff has prepared its recommendation with regard to the investigation of AID-financed sales of tallow to Egypt.

8. The staff recommendations discuss, *inter alia*, the bringing of cases under the Sherman Act, 15 U.S.C. § 4, the Foreign Assistance Act, 22 U.S.C. § 2399b, and the False Claims Act, 31 U.S.C. §§ 3729-3731.

9. The Antitrust Division is authorized pursuant to 28 C.F.R. § 0.40(a) to recover forfeitures or damages for injuries sustained by the United States as a result of antitrust law violations, for example, under the False Claims Act. Nevertheless, the Civil Division of the U.S. Department of Justice has primary responsibility for and expertise in the enforcement of the False Claims Act. 28 C.F.R. § 0.45(d).

10. The Antitrust Division wants the advice of the Civil Divisions of the U.S. Department of Justice and the U.S. Attorneys Office for the Southern District of New York before proceeding with any action in this matter under the False Claims Act in order to maintain consistency in the enforcement effort and the exercise of prosecutorial discretion by the Department of Justice. Given its expertise in enforcing the False Claims Act, these Divisions are in a position to advise the Antitrust Division on the appropriateness of prosecuting this matter under the False Claims Act.

11. To the best of my knowledge and belief, and based upon due inquiry, none of the grand jury materials has been furnished, shown, or otherwise disclosed to any attorney of the Civil Divisions of the U.S. Department of Justice or the U.S. Attorneys Office for the Southern District of New York.

12. This affidavit is based upon personal knowledge, information, and belief.

/s/ ANNA SWERDEL

Anna Swerdel
Attorney
Antitrust Division
U.S. Department of Justice

District of Columbia

Subscribed and sworn to before me this 29th day of November, 1984.

/s/ [illegible]

Notary Public
My Commission Expires: March 14, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188 CLB

IN RE UNITED STATES DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

March 12, 1985
2:00 p.m.

Before:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES

RUDOLPH W. GIULIANI,
United States Attorney for the
Southern District of New York,

CRAIG W. CONRATH

ANNA SWERDEL

NANCY KILSON
Assistant United States Attorneys

PAUL R. GRAND

DIANE PARKER
Attorney for Witness

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[2] THE COURT: Everybody in the room here officially.

MS. KILSON: Nancy Kilson. I am liaison counsel with the Department of Justice on this case.

THE COURT: You are an Assistant U.S. Attorney.

MS. KILSON: Yes, your Honor.

THE COURT: The capacity of Mr. Conrath and Ms. Swerdel?

MR. CONRATH: We are attorneys with the Antitrust Division in Washington.

THE COURT: While the court was waiting to convene I did have a chance to read the proposed papers and I have ascertained that there is a sealed court order dated November 30, 1984, and it seems to me the impression of Mr. Grand, who has never seen the order, that it was signed by Judge Palmieri of this court and if that is true then any collateral attack on that order would have to be heard by Judge Palmieri, because I am not established here to review his determinations.

However, I have not seen the order. I sent the clerk of the court to go look for it, which is like looking for needle in the haystack. So maybe Mr. Conrath or Miss Swerdel, maybe you will determine whether that's true, whether he is the author the order relied upon.

MR. CONRATH: That's correct.

[3] MR. GRAND: The issues we are raising is the footnote 15 Sells.

THE COURT: Be that as it may, if there's any relief to be obtained from that order, that must be obtained from Judge Palmieri.

THE COURT: The clerk is on the telephone now and wants to know who the assistant was on the matter so he can find the alleged order, unless you people have a copy with you.

MR. CONRATH: We do, your Honor.

THE COURT: Would you show me the order please, Mr. Conrath.

THE COURT: Have you people had a chance to see Mr. Grand's proposed papers?

MR. CONRATH: Yes, your Honor. We got them at 10:30 this morning.

THE COURT: Well, it seems to me that it would be appropriate that the contents of this order be revealed to counsel, unless there's a reason not to and, as I said

earlier, this proposed order to show cause here essentially is an attack upon or an application to modify that order it seems to me and, therefore, properly must be referred to Judge Palmieri for his consideration, unless he refuses to hear it.

MR. GRAND: Judge, I am sure you grasp this. In [4] addition to being that, it is also an application that I think probably has nothing to do with Judge Palmieri's order and that is to preclude the antitrust division from using grand jury material to prepare—

THE COURT: Is there any reason why counsel cannot see this order, because he is talking in the dark?

MR. CONRATH: We have no objection to removing the seal from that order.

THE COURT: Would you give him a copy of it? Kindly do so. The simple answer, Mr. Grand, is it appears to this court that the department is proceeding in all respects pursuant to an authorization by a judge of this court and that being so any relief from that order ought to be presented to Judge Palmieri.

MR. GRAND: Judge, this order, as I understand it, authorizes the antitrust division to confer with attorneys in the civil division or the U.S. Attorney's office. It does not authorize the antitrust division to use the grand jury material to prepare and file and litigate a civil lawsuit.

THE COURT: Would you kindly tell me whether it was your opinion that the court ordered those matters to be disclosed to persons known to be, by their very titles, in the commercial litigation branch of the civil division of the Department of Justice merely to titillate their [5] curiosity.

MR. GRAND: I think that the purpose of it, as I understand it from conferences I have had with the antitrust division, it was to consult with them on whether or not a civil litigation should be begun and the order on its terms says that the information will be treated as confiden-

tial and its use will be limited solely for the purposes of this order. It does not authorize disclosure to the world, judge. It just doesn't.

THE COURT: I really must say with no disrespect that I couldn't disagree more. Here is a court which turns over grand jury minutes and exhibits to named persons by their titles and once that's done you are asking me to have the milk that's been spilled put back into the bottle and I can't do that.

I think I should deny all relief here with leave to apply to Judge Palmieri if you deem yourself so advised.

Do you understand the problem, Mr. Conrath? Is there any better suggestion you have?

MR. GRAND: If you think Judge Palmieri ought to be the person to decide this—

THE COURT: I think Judge Palmieri gave them these minutes for lawful use—

MR. GRAND: How can we know if we have not reviewed the application or the showing of what the [6] particularized need was. Sells makes it clear.

THE COURT: Is there any reason why the petition cannot be disclosed to counsel?

MR. CONRATH: No, your Honor.

THE COURT: I'm sorry.

MR. CONRATH: No, your Honor. There's no reason.

THE COURT: All right. This court orders that the original order and motion which resulted in the order of November 30, 1984, be unsealed when and if the clerk of court can find it and I urge you both to go down to the clerk's office and try to assist the clerk in finding it so it can be unsealed. Beyond that, I am unwilling to go. I will give you a memorandum endorsement.

MR. GRAND: Are you saying we should go to Judge Palmieri?

THE COURT: No. You should go down to the clerk's office and see if you can find the original. I am ordering it unsealed. After you have read, it if you believe your rights are affected in some fashion, you may either apply to Judge Palmieri or I don't know what else you can do. The court has released this material to the civil division.

MR. GRAND: Neither the civil division nor these people are authorized by an order to commence a lawsuit, judge.

[7] THE COURT: They don't need authorization to commence a lawsuit. What they needed was authorization to look at these grand jury materials, upon a showing of specialized need, to get the information they need for whatever official duties they plan to discharge, including even the recommendation of new legislation to congress.

MR. GRAND: That may be, but that does not warrant wholesale disclosure beyond that in the form of the commencement of a civil lawsuit for all of the reasons set forth in Sells.

THE COURT: Do you have the motion with you?

MR. CONRATH: Yes.

(Pause)

MR. GRAND: May I address your Honor?

THE COURT: Certainly.

MR. GRAND: It seems to me both the application and the order dealt only with consultation.

THE COURT: I don't so read it.

MR. GRAND: That's all they were asking for. The issue that was reserved in the Sells case, i.e., whether or not the prosecutors before the grand jury can use the material to bring a civil case, was specifically reserved by the Supreme Court in Sells with the Supreme Court noting that there were numerous issues that should be considered and weighed in arriving at the decision it [8] arrived at or in the matter reserved.

THE COURT: One of us doesn't understand this, Mr. Grand and I really think it's you. May I say this to you: A civil division attorney for the government can get grand jury minutes and exhibits upon a showing of particularized need, from a judge, pursuant to 6(e) of the rules of criminal procedure.

MR. GRAND: That's correct, sir.

THE COURT: They went to a judge whose commission from the president is the same dimensions as my own. They made a showing in writing which his Honor Judge Palmieri thought to be a showing of particularized need. Judge Palmieri signed an order which is broad enough to let them spill the milk on the ground which they did and I don't see anything further that this court can do or should do about it and I have issued an order here which you can conform your copy telling exactly my view of the matter.

You can either apply to Judge Palmieri, which seems to me to be of no help at this stage, because they already got it, or you can take an appeal from my order or you can wait until you get sued and move to dismiss the action on the ground of violation of rights under Sells.

Beyond that, there's nothing here to do. Would you read the court's order?

MR. GRAND: It seems to me the essential failure [9] of those application papers are to deal with the question of whether the Department of Justice made any other attempt to get the information which was readily available to them.

THE COURT: I do not sit here for purposes of revising the judicial determinations of another judge of equal rank.

MR. GRAND: I think then the answer is I have to go to Judge Palmieri.

THE COURT: That might well be true. Any decision made here is without prejudice to anything that you take up with Judge Palmieri. I think in fairness you should order the transcript and make that available to his Honor.

MR. GRAND: I will certainly do that.

THE COURT: I might say also I am not even reaching the question of whether these papers show a particularized need for disclosure because that's a finding he already made and I am not concerned with that finding. All right. Thank you very much.

RESPONDENTS' PROPOSED ORDER TO SHOW CAUSE AND PROTECTIVE ORDER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. (Sealed)

IN RE GRAND JURY INVESTIGATION

ORDER TO SHOW CAUSE AND PROTECTIVE ORDER PURSUANT TO RULE 6(e), FED. R. CRIM.P.

On the application of petitioners for an Order to Show Cause and Protective Order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure in the above-captioned action, the affidavit of Paul R. Grand and memorandum of law in support of the application, the Court is satisfied that petitioners have made a sufficient and proper showing in support of the temporary relief granted herein. It is, therefore, hereby

ORDERED that the Antitrust Division of the Department of Justice show cause, if any there be, to this Court at ____ m. on the ____ day of March, 1985, in Room ____ of the United States Courthouse, Foley Square, New York, New York, or as soon thereafter as counsel can be heard, why this Court should not enter a protective order pursuant to Rule 6(e), Fed.R.Crim.Pro.:

1. Prohibiting further disclosure of any testimony, exhibits, documents or other matters occurring before the grand jury in the tallow investigation, or the substance thereof, by the Antitrust Division to the Civil Division until final adjudication of the matters raised by this petition and any other such petitions as may be made in connection herewith before this Court and any other Court;

2. Prohibiting the use of grand jury material obtained in the tallow investigation in preparing, filing or litigating the civil action contemplated by the Antitrust Division

pending final adjudication of the matters raised by this petition and any other such petitions as may be made in connection herewith before this Court and any other court;

3. Sealing this application and all motion papers and pleadings filed in this Court arising out of the grand jury tallow investigation; and

4. Directing the Justice Department to serve on petitioners herein all papers and pleadings previously and hereinafter filed in this Court and any other Court in connection herewith. It is further

ORDERED that until the date set above by this Court:

1. Further disclosure of any testimony, exhibits, documents or other matters occurring before the grand jury in the tallow investigation, or the substance thereof by the Antitrust Division is prohibited;

2. The use of grand jury material obtained in the tallow investigation in preparing, filing or litigating the civil action contemplated by the Antitrust Division is prohibited;

3. This application and all motion papers and pleadings filed in this Court arising out of the grand jury tallow investigation are sealed; and

4. The Justice Department is directed to serve on petitioners herein all papers and pleadings previously or hereafter filed in this Court and any other Court in connection herewith. It is further

ORDERED that service of this Order and the plaintiff's application, along with all supporting documents, shall be effected upon the Antitrust Division on or before the ____ day of March 1985. Service may be made personally or by mail.

_____

United States District Judge

Dated: March ____, 1985.

[ORDER OF JUDGE BRIEANT]

After hearing counsel this date I decline to sign the within order. See transcript of hearing this date. Movant appears to be seeking to attack collaterally in this proceeding an ex parte order by Judge Palmieri of this Court dated November 30, 1984 [.] No jurisdiction exists to do so. This determination is without prejudice to any application which movant may desire to make before Judge Palmieri.

SO ORDERED

/s/ CHARLES BRIEANT
U.S.D.J. (Part I)

New York, N.Y.
March 12, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M 11-188 ELP

IN RE UNITED STATES DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

March 12, 1985
3:00 p.m.

Before:

HON. EMUND L. PALMIERI,

District Judge

APPEARANCES

RUDOLPH W. GIULIANI,
United States Attorney for the Southern District of New York,

CRAIG W. CONRATH

ANNA SWERDEL

NANCY KILSON
Assistant United States Attorneys

PAUL R. GRAND

DIANE PARKER
Attorney for Witness

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[2] (In chambers)

THE COURT: I am recognizing Mr. Grand, who is here to propose certain interim restraints on an order to show cause arising from the ex parte order which I signed under Rule 6[c] of the Federal Rules of Criminal Procedure on the affidavit of Miss Swerdel of the antitrust division of the Department of Justice sometime ago. What was the date of that order?

MS. SWERDEL: November 30, 1984.

THE COURT: Go ahead, Mr. Grand.

MR. GRAND: Let me begin with the aspect of the relief that I seek that I think has nothing to do with your order. You will no doubt recall that in a footnote in the Sells Engineering opinion the Supreme Court left open and did not decide whether or not the same attorneys who present a case to the grand jury shall be permitted to use the grand jury materials for the purpose of bringing a civil case. The court did not rule on that subject, left it open.

We believe the court did, in deciding the matter that it did decide, provide guidance for that future decision and, in particular, set out a standard of weighing various considerations, one of which has to do with whether or not the justice department has made any effort to obtain the materials that they intend to use in the civil case [3] through ordinary civil means.

We believe that the present case, which occupied a grand jury investigation for in excess of two years and resulted in no indictments, could also have been investigated civily either concurrently with the grand jury investigation or indeed after the grand jury investigation.

However, we have reason to believe that at least 90 percent of the material on the basis of which the civil complaint is now to be filed, and I was just told that it will be filed on Friday, was grand jury material.

In other words, the civil case that we are now about to be greeted with is a product of the grand jury's investigation in virtually its entirety.

THE COURT: When you say will be filed, will be filed publicly?

MR. GRAND: I don't know and that may well be an issue for your Honor to decide this afternoon.

THE COURT: That's what you understand the representation to be?

MR. GRAND: I do.

THE COURT: All right. We'll see. We'll hear in a moment. Go ahead.

MR. GRAND: We believe that under the teaching of Sells and the considerations that are set forth in Sells, [4] all of which are elaborated upon in our papers, the antitrust division should not be permitted to use secret grand jury materials to file a civil lawsuit and that is an issue that we want to litigate before your Honor and that we want to litigate as far as it needs to be litigated to get a resolution.

THE COURT: Does the Sells case cast any light on this issue?

MR. GRAND: The Sells case sheds considerable light, although it specifically left that issue open in footnote 15.

THE COURT: There are other things in that decision besides footnote 15.

MR. GRAND: There are a series of considerations that the Sells case dealt with. One, they dealt with the fact that civil lawyers are only ordinarily seeking to save time by using the grand jury and that in most cases the evidence would otherwise be available through ordinary discovery.

That is I think an important factor and I think is a factor that would readily apply here.

Another factor is that the Supreme Court pointed out that the unfettered access for civil purposes to grand jury materials can lead to the manipulation of the grand jury in ways that are hard to detect.

[5] THE COURT: Mr. Grand, there are all kinds of precautions that perhaps need to be taken and the matter is undoubtedly a delicate matter. I just want to clear the atmosphere of the impression that I think you imply from what you say that what the government did by this ex parte order in November was clearly wrong and forbidden by the federal rules. I don't think that's so.

MR. GRAND: I am not suggesting that their seeking relief from your Honor was wrong. I think I am addressing a different subject. I will come to the ex parte order.

I believe there are two issues that are here today. One has to do with whether the ex parte order that your Honor issued on November 30 should be vacated.

Putting that aside for the moment and dealing instead with another issue that I believe that order did not address because that order as I read it, and as you interlineated between the proposed order, limited the disclosure that the antitrust division was permitted to make to specif[ic] people in the civil division for purposes of consultation only.

THE COURT: I think that's the case. Do you have a copy of my order?

MR. CONRATH: Yes, your Honor.

THE COURT: I have a very distinct recollection of the interlineation that I put in there at the time.

[6] You want to pursue your second point?

MR. GRAND: My second point is that irrespective of this order which, after all, only authorizes the antitrust division to consult on a limited basis with people in the civil division, we contend that under the guidelines of the Sells case prosecutors who present matters to grand juries, at least in our case, cannot go forward and present—use those materials to prepare a civil case and publicly expose those materials, absent an order and a showing of particularized need.

THE COURT: Is that not a little premature?

MR. GRAND: Only in the sense that they have not yet filed a suit and they are going to file it on Friday and it may be moot by Friday.

THE COURT: You are not moving to vacate the order at this time. What you are moving is to prevent the government or the attorneys who represent the government, who participated in the grand jury investigation, from having anything to do with any civil aspects of their proposed proceedings?

MR. GRAND: In the absence of their coming before a court and satisfying Rule 6(e) and making a showing of particularized need to use grand jury materials in a civil case.

THE COURT: Have you read the papers submitted [7] by Miss Swerdel?

MR. GRAND: I have read the papers.

THE COURT: You don't think she made a showing?

MR. GRAND: I don't think she was applying for the relief we are talking about. I don't think she made a showing of particularized need on a couple of scores.

THE COURT: The entire impact of the papers she submitted were to show there was a particularized need. She just didn't say give me these grand jury minutes, I would like to have them. She went through a great deal of trouble to indicate why they were necessary and why that was.

MR. GRAND: I believe what those papers say in a word was that the antitrust division in order to have a uniform policy seeks to consult with the civil division.

There was, as I read it, no comment whatever of any efforts that the civil division had made to seek this discovery that they had gotten in the grand jury by other available means.

THE COURT: Isn't that another issue?

MR. GRAND: I don't think so.

THE COURT: Yes, it is.

MR. GRAND: Part of particularized need is showing that you have to use the grand jury materials for this purpose. That's one aspect. The other aspect is [8] there was no limitation on what they disclosed. They disclosed or they sought permission to disclose the entire contents of what had taken place before the grand jury, a description, as they put it, of the documents and of the evidence and excerpts from both.

I think that on the two traditional grounds that courts look at to determine whether or not particularized need to invade grand jury secrecy has been shown, they failed to make such a showing on either ground.

THE COURT: Miss Swerdel, I think I should hear from you at this point.

MS. SWERDEL: Mr. Conrath will be addressing you today.

MR. CONRATH: Your Honor, this is a case we plan to file on Friday and the the reason we plan to file on Friday is in order to preserve our right to one of the claims that we will be pursuing that would entitle the government to about $240,000 worth of damages.

The statute we believe will run, if not Friday, very shortly thereafter, Monday or Tuesday and that's the reason we want to file.

What we have here is Mr. Grand is asking for an order prohibiting us from filing our complaint based on facts, most of which they knew several months ago and we think that your Honor ought to deny this motion because, [9] first of all, as you indicate, there was a particularized need in the one disclosure.

There would be an injury to the government if we are unable to file this case on Friday. There's a fully adequate remedy available to Mr. Grand's client which is to litigate any remaining questions of grand jury disclosure in the course of the case before the judge to whom it is assigned in connection with all the other issues.

MR. GRAND: If I may, your Honor, I don't know how I can litigate the grand jury disclosure once it's been spread all over the record.

Secondly, we have offered in the past and I am authorized by my cocounsel, if they are worried about the statute of limitations, we have offered repeatedly in the past to give them a waiver of the statute of limitations in any form they want to enable us to litigate this important Sells issue that the Supreme Court left open.

MR. CONRATH: Your Honor, the particular statute of limitations is jurisdictional under the false claims act, so that we cannot waive it. It cannot be waived.

As I understand it, there are two points to Mr. Grand's argument. One is a collateral attack on the order that your Honor issued, for which we believe that there's particularized need as set forth in the papers.

The other is in essence in Miss Swerdel's head [10] and my head there should be a civil side and criminal side and it is disclosure for us to use knowledge we already have to prepare a civil case and it's our understanding, it's our position, that that's not required.

THE COURT: That seems to me that the trial judge should decide that. I shouldn't. The standing of the attorney to pursue the case is something that traditionally is a matter for the trial judge.

You are going to file the complaint on Friday?

MR. CONRATH: Yes, your Honor.

THE COURT: At that point the case will be assigned to a judge?

MR. CONRATH: Yes.

MS. PARKER: We are not challenging merely the standing of these particular attorneys to try the case. What we are challenging is the fact that these particular attorneys are going to use grand jury material in writing up a complaint and, for example, on the false claims act they have to attach to the complaint the false claims and they are going to use grand jury material for that and so on Friday they will, in essence, publicly file grand jury material without a Rule 6(e) order and it is their position that they need no such order.

What we are here to litigate today is whether in fact they need a Rule 6(e) order under Sells to do what [11] they plan to do and we would like the temporary relief we have requested simply in order for the court to have the time to consider this matter, to consider our papers and whatever papers they submit before they take the action that we feel is prohibited by the supreme court's decision in Sells and I might add by the supreme court's decision in Abbott, in which the Supreme Court said wholesale disclosure of grand jury material is never authorized under Rule 6(e).

THE COURT: I don't think that there is either a persuasive or sufficient showing either to vacate my order or

to stop the government in its tracks in what it's about to do. I think you have adequate and complete remedies before the trial court and they are not, in effect, filing grand jury material.

They are filing the conclusions, the legal conclusions, that they may have drawn for the purpose of pleading a civil case, which is a very different thing from publishing grand jury material. I believe that they have a perfect right to do what they did.

The affidavit submitted to me and the papers in connection with the ex parte motion in November were sufficient justification for everything they did.

In the light of the possible application of the jurisdictional statute of limitations, I don't think it [12] would be fair or appropriate for me to intervene at this time with any kind of restraint.

I would refer you to the trial judge. As soon as the case is assigned you have a right to tell the judge to impound all the papers and to keep the government attorneys out of the case who had anything to do with the grand jury.

All the remedies that you are seeking from me now you can obtain fully and adequately from the trial judge. I see no reason why I should step in because I signed this ex parte order or because of the representations that you make at this time.

MR. GRAND: May we, your Honor, at a minimum, have an order sealing the complaint because my best guess is that it will summarize much that took place in the grand jury and that will at least preserve—it will no way adversely affect their statute of limitations claims and it will give us an opportunity, without having been prejudiced, to litigate the issue.

THE COURT: I can't function on the basis of your guesses. I have seen your guesses work adequately and very effectively in other cases and have respect for them. I can't function on the basis of what you think is going to happen. You'll have to wait for it to happen and assert your right to the remedies at that time.

[13] MS. PARKER: You can ask Miss Swerdel if the complaint will summarize what took place before the grand jury.

MR. CONRATH: The complaint that we file is not going to quote from any transcripts or documents that were made exhibits before the grand jury. It will summarize, as you said, the legal conclusions adequate to plead the case. It is not a disclosure of matters occurring before the grand jury except in the general sense.

MS. PARKER: It has to include facts?

MR. CONRATH: Of course.

MR. GRAND: Those facts are facts developed before the grand jury.

MR. CONRATH: It will in no way indicate which facts were developed before the grand jury and elsewhere.

THE COURT: No pleader worth his salt is going to spill his case in advance. You will have to define or refine all the issues by the usual process of pretrial procedure and then you will be able to find out, without too much trouble, exactly what they are basing their allegations on and whether or not they have made improper use of grand jury material.

But those issues will become available to the trial judge only as a result of the pretrial procedures which are available to you in the first instance.

[14] MR. GRAND: May I respectfully disagree for this reason: When I was talking to your law clerk before we came up he asked the question as to whether or not the grand jury material was used or will be used in the preparation of this complaint. I believe the parties sitting here will stipulate with your Honor that at least 90 percent of the information which is the basis of this complaint will be litigated.

I know they have no other source of information of what they are going to charge is the grand jury. They know it too. They will not say to you that it is necessary to

litigate before a trial judge, to litigate whether or not they using grand jury materials. This entire civil case arrives from the grand jury.

So what we have is a discrete legal issue that we will be prejudiced with respect to litigating because the complaint, which will summarize the grand jury's events — we will be prejudiced from litigating because it will have already been spread on the public record. I think what I am asking is minimal

THE COURT: I don't agree with you, Mr. Grand.

I will ask: Is there any reason why you should make this complaint public at the time you file it? Could you not file it and ask the clerk to maintain it in a separate file until the trial court disposes of the issues [15] that are about to be litigated? I don't want you to make copies of it, for instance, and give it to the press room. That's one thing.

I don't think you should make copies for distribution to anyone except the persons who are directly connected with the case. That way Mr. Grand will have an opportunity to press his objections properly, because if you have made a public disclosure of everything in the complaint and if the complaint does indeed set forth facts which he believes should never have been disclosed, then he will be coming in with his remedy a little bit after the facts which have hurt him and I want to make his remedy effective if he's entitled to it.

So in order to protect him and preserve whatever rights he may have, have you any objection to withholding publicity and such filing as you can withhold until the such time as the trial judge passes on it?

I realize you have to file it in the clerk's office. There are so many steps that you can take to prevent any unnecessary disclosure pending the decision of the trial judge.

MR. CONRATH: We have a problem with actually filing it under seal, your Honor, because of the strong general interest in the openness of court proceedings. I

think we can undertake not to seek publicity by not putting [16] out a press release.

THE COURT: One thing I can ask you: I gave you this permission and stressed the fact that it was being given provided that the information be treated as confidential or its use be limited solely to purposes of this order.

MR. CONRATH: Yes.

THE COURT: Consistent with those special conditions, it seems to me that you could, number one, avoid answering questions that may be posed by the press or anybody else.

Number 2, avoid giving copies of the complaint to anyone except Mr. Grand.

MR. GRAND: And I assume other parties.

THE COURT: You are only one of the parties?

MR. GRAND: Yes.

THE COURT: Mr. Grand and the attorneys for the other parties only, not given to anyone else and not release any press notice of any kind.

That way it seems to me that you are not shutting the door on Mr. Grand's finger so to speak. The door is being left open so he can press his claim under Sells, if he has one, to the trial court.

MR. GRAND: How do we handle the clerk's office to make sure the press people don't come in there?

[17] THE COURT: I'll ask them. When you file the complaint—you know now exactly when you are going to file it?

MS. SWERDEL: As of now, Friday afternoon.

THE COURT: I will give instructions orally myself today to the clerk. Can you send me not later than Thursday a facsimile the caption of the case?

MS. SWERDEL: Yes, your Honor. I can give it to your law secretary.

THE COURT: Give it to him. I will call the clerk, who is in charge of the civil case filings, and I'll give him

specific instructions about filing the complaint and not making it available to persons other than parties until such times as the trial judge has an opportunity to get into it.

That's agreeable to you?

MR. CONRATH: Yes, your Honor.

THE COURT: You have no objection to complying with my request and you will promise to comply with it?

MR. CONRATH: Yes.

MR. GRAND: And the clerk will be so instructed as well?

THE COURT: Yes. I will instruct the clerk today. I have an IRS agent I'm conferring with and as soon as I'm through with him I will definitey call the clerk by [18] 4 o'clock.

MR. GRAND: Your Honor, can we treat your rulings today as a denial of both our order to show cause and our protective order?

THE COURT: Without prejudice to renewal before the trial judge.

Application denied after argument. See record of March 12, 1985. Denial is without prejudice to the renewal of the application before the trial judge.

MR. GRAND: What I am looking for is not only a denial of our application to show cause but for also the ultimate relief sought, the protective order.

THE COURT: Yes. You are asking for two things, to vacate my order and for protection and I am denying both without prejudice.

Actually, it's an application for an order to show cause. I am denying that. We have really gone a little bit into the merits.

MR. GRAND: In case we decide to appeal, I would rather it be as full a denial as in reality it really is.

THE COURT: I'll read this. Tell me whether you see any objection: application for vacat[u]r and protective

relief denied without prejudice to their renewal before the trial judge expected to be assigned when case is filed on March 15, 1985. See record of March 12, 1985. So ordered.

[19] MR. GRAND: Do you think there should be anything in that order about the way the complaint should be treated?

THE COURT: I think you would be guilding the lily. You could take my word for it. I have put it in the record and my instructions to the clerk are on the record. I think you can rely on that.

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No.

IN RE GRAND JURY INVESTIGATION

STATE OF NEW YORK)
: ss. :
COUNTY OF NEW YORK)

Paul R. Grand, being duly sworn, deposes and says:

1. I am a member of the firm of Grand & Ostrow, attorneys for movants/appellants John Does I and II, and John Doe, Inc. I in the above captioned action and submit this affidavit in support of the instant motion for a protective order and an expedited appeal. The relevant facts are as follows.

RELEVANT FACTS

2. Some months prior to April 1982, the Antitrust Division commenced a grand jury investigation into possible Sherman Act violations in connection with the sale of tallow to Egypt. The theory of the investigation was that Sherman Act jurisdiction existed for sales of drummed tallow to Egypt, even though that commodity is not sold within the United States, because Egypt sometimes used some of the funds appropriated to Egypt by Congress to pay for the commodity.

3. By April 1982, many thousands of documents had been subpoenaed by the Antitrust Division, including from petitioners John Doe, Incs. I, II and III. Thereafter numerous witnesses testified before the grand jury, including petitioners John Does I, II, III, IV and V. Beginning in the summer of 1982 and repeatedly thereafter, at-

torneys for petitioners advised the Antitrust Division that the acts in question were not within the subject matter jurisdiction of the Sherman Act. Nonetheless, the Antitrust Division continued to use the grand jury. On the eve of the expiration of the grand jury, June 8, 1984, the Antitrust Division informed petitioners that the grand jury would not be asked to return any indictments, but that the Antitrust Division was considering initiating a civil lawsuit.

4. On June 28, 1984, the attorney who had been in charge of the grand jury investigation mailed Civil Investigative Demands ("CID") to petitioners herein. The CID's were essentially copies of earlier grand jury subpeonas and were accompanied by a letter advising the recipients that the CID could be complied with by certifying that all documents sought had been produced to the grand jury. In response, petitioners John Doe, Incs., I and II declined to execute such a certificate and advised the Antitrust Division that the use of grand jury materials, including documents produced in response to grand jury subpeonas and grand jury testimony and leads therefrom, to prepare a civil suit would violate Rule 6(e). John Doe, Inc. III executed the certificate specifically preserving its rights under *Sells*. No documents were produced in response to the CIDs and the Antitrust Division made no attempt to enforce the CIDs. Instead, the Antitrust Division simply retained all documents produced to the grand jury even though the grand jury had expired.

5. On March 6, 1985, the Antitrust Division informed appellants that on November 30, 1984, it had obtained, without notice, an *ex parte* order authorizing disclosure of gand jury material to the Civil Division. This order was obtained three months after the Antitrust Division first consulted with the Civil Division, the order improperly authorized wholesale disclosure to the Civil Division, and no showing of particularized need was made.

6. The Antitrust Division further informed appellants on March 12, 1985 that it will file a civil complaint alleging violations of the Sherman Act and federal false claims acts

on March 15, 1985. The theory of the lawsuit apparently will be that price fixing of tallow sold to Egypt injured the foreign policy of the United States and that, because the United States was not explicitly informed of that price fixing, implied false claims were made in violation of the United States' expectation of competitive bidding.

7. Neither the Antitrust Division nor the Civil Division has made any effort to obtain any evidence on which to base this lawsuit, other than from the information obtained by the grand jury. Indeed, the Antitrust Division has conceded that at least 90 percent of the material on which the civil case will be based is grand jury material. Enforcement has not been sought for any Civil Investigative Demands for documents or depositions pursuant to 15 U.S.C. § 1312(a), (b)(2), (i)(1). Instead, the Antitrust Division made a unilateral decision, without authorization from the court, that it was entitled to the wholesale use of grand jury material, which includes many thousands of documents (none of which have been returned to their owners in the nine months since the grand jury expired) and testimony of numerous witnesses, to initiate and litigate a civil lawsuit.

THE NEED FOR A PROTECTIVE ORDER

8. If disclosure is permitted, appellants will, in effect, lose four fundamental rights: (1) their right to have the continuing improper use of grand jury material terminated immediately; (2) their right to have the substance of their own grand jury testimony and the testimony of others which pertains to them kept secret; (3) their right to have attorneys other than those who conducted the grand jury investigation prepare and litigate any civil case; and (4) their right to appeal the district court's ruling below. These rights, once taken away, cannot be restored after the civil

complaint has been filed. At that point, the issue of whether the filing of the complaint violates the appellants' rights becomes moot.

9. The grand jury began subpoenaing documents and hearing testimony three years ago. Having waited this long to bring its complaint, the Government now claims that the statute of limitations will run next week as to *a small fraction* of the claims that it proposes to make in the complaint against appellants. Appellants have agreed to waive the statute of limitations as to those claims pending the resolution of this appeal. The Government responds by arguing that the statute of limitations cannot be waived by appellants because the issue is "jurisdictional."

10. We do not agree that the statute of limitations cannot be waived or that this purported problem cannot be overcome by agreement of the parties But in addition, it is patently unfair for the Government to wait this long before deciding to file this complaint and then use that delay (of the Government's own making) as an excuse to oppose the appellant's right to litigate fundamental rights which would be lost by the filing of the complaint.

11. The public interest lies in maintaining the status quo in this case because this case raises fundamental issues concerning grand jury secrecy. Absent a stay, this Court will be unable to resolve those issues, as they will have been mooted. The importance of these issues is amply demonstrated by the three recent Supreme Court decisions upholding grand jury secrecy: *Sells, Baggot* and *Abbott.*

12. No prior request has been made to this Court for the relief requested by the instant motion.

/s/ PAUL R. GRAND
Paul R. Grand

Sworn to before me this
12th day of March, 1985

/s/ HARRIET LOBE
Notary Public

In the Supreme Court of the United States

No. 85-1613

UNITED STATES, PETITIONER

v.

JOHN DOE INC. I, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 27, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20522

No. 85-1613

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE, INC. I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
RICHARD K. WILLARD
Assistant Attorneys General

LOUIS R. COHEN
Deputy Solicitor General

W. STEPHEN CANNON
Deputy Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ROBERT B. NICHOLSON
STEVE MAC ISAAC
DOUGLAS N. LETTER
ANNA SWERDEL
CAROLYN G. MARK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

58 pp

QUESTIONS PRESENTED

1. Whether an attorney of the Antitrust Division of the Department of Justice who has properly had access to grand jury materials while conducting a criminal investigation may use the same materials in preparing for and litigating a related civil case without obtaining a disclosure order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

2. Whether the district court acted within its discretion when it issued a Rule 6(e) order authorizing the Antitrust Division to disclose certain grand jury materials to attorneys in the Civil Division and the United States Attorney's Office in order to obtain their advice and ensure consistent federal enforcement of the False Claims Act, a federal statute as to which the Civil Division has the primary enforcement responsibility.

PARTIES TO THE PROCEEDING

Respondents here include three corporations—John Does, Inc. I, II, and III, respectively—that are defendants in *United States* v. *"A" Corp.*, Civ. No. 85-2062 (S.D.N.Y.), filed under seal, and five individuals —John Does I, II, III, IV, and V, respectively—who are officers or employees of those corporations.*

* Because of the grand jury secrecy issues involved in this case, both the district court and the court of appeals ordered that the civil complaint filed by the government be kept under seal. J.A. 40-42; Pet. App. 2a, 20a.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1613

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE, INC. I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 774 F.2d 34. The orders of the district court (Pet. App. 21a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1985. A petition for rehearing was denied on December 2, 1985 (Pet. App. 24a). On February 25, 1986, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including April 1, 1986. The petition was filed on March 31, 1986, and was granted on

May 27, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> Recording and Disclosure of Proceedings.
>
> * * * * *
>
> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. * * *
>
> (3) Exceptions.
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel * * * as are deemed necessary * * * to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury * * * with the names of the persons to whom such disclosure has been made * * *.
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

STATEMENT

A. Background

1. In November 1981, the Agency for International Development (AID) of the Department of State notified the Antitrust Division of the Department of Justice that the conduct of certain American companies involved in AID-financed sales of tallow [1] to a foreign government might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq.* Attorneys from the Antitrust Division con-

[1] Tallow is used in the manufacture of soap, animal feed, and lubricants.

ducted an investigation from March 1982 through June 1984. In the course of that investigation, a grand jury in the Southern District of New York heard testimony from several dozen witnesses and reviewed approximately 250,000 pages of subpoenaed documents (Pet. App. 2a; J.A. 17-18).

Early in June 1984, the Antitrust Division tentatively concluded that the respondents and at least one other company had violated Section 1 of the Sherman Act, 15 U.S.C. 1, but also decided that a criminal prosecution was inappropriate. The grand jury investigation was therefore promptly terminated without an indictment being sought (J.A. 10, 18). At the same time, however, the Antitrust Division concluded that a civil action against the corporate respondents might be appropriate. Accordingly, the Assistant Attorney General in charge of the Antitrust Division instructed the attorneys who had conducted the grand jury investigation to consider a possible suit for injunctive relief under the Sherman Act [2] and damages under the False Claims Act, 31 U.S.C. (& Supp. II) 3729-3731 (Pet. App. 2a; J.A. 10, 16, 18).

Late in June 1984, pursuant to the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314, the government issued civil investigative demands (CIDs) for documents to nearly two dozen persons who had received grand jury subpoenas, including the corporate respondents here and approximately twenty other persons. The scope of the CIDs overlapped that of the earlier grand jury subpoenas, and the Antitrust Division notified the CID recipients that they could comply with the CIDs by certifying that they had

[2] The government may enforce the Sherman Act through both criminal prosecutions and civil suits. See 15 U.S.C. 1, 4, 15a.

produced all requested documents pursuant to the grand jury subpoenas. Nearly all of the CID recipients elected to comply in this manner. Two of the corporate respondents here, however, declined to certify that they had previously produced the sought-after documents, although they informally advised the Division that they had in fact done so. In the course of the civil investigation, the Antitrust Division attorneys also interviewed prospective witnesses and obtained documents from persons on a voluntary basis. Pet. App. 2a-3a; J.A. 16, 44.

2. The Antitrust Division ultimately concluded that the conduct at issue violated the Sherman Act and possibly the False Claims Act, and the Division considered bringing suit under both statutes. Although the Antitrust Division is authorized to prosecute False Claims Acts suits when the conduct in question also violates the antitrust laws (28 C.F.R. 0.40(a)), the primary responsibility for the enforcement of that statute rests with the Civil Division of the Department of Justice (28 C.F.R. 0.45(d)). Accordingly, the Antitrust Division determined that in order to ensure consistency in the government's enforcement of the False Claims Act, it should seek the advice of Civil Division attorneys as to the appropriateness of a False Claims Act suit on the facts of this case. The Antitrust Division also needed to consult with attorneys in the United States Attorney's Office for the Southern District of New York, where a civil suit would be filed. J.A. 11, 13, 14-15, 18.

The Antitrust and Civil Division attorneys entered into preliminary discussions that did not involve any disclosure of grand jury materials (Pet. App. 3a; see J.A. 19). These discussions proved insufficient,

however, because the Civil Division attorneys were unable fully to advise the Antitrust Division whether a False Claims Act suit would be appropriate without reviewing information compiled by the grand jury. Accordingly, to take advantage of the Civil Division's experience, the Antitrust Division attorneys deemed it necessary to disclose some grand jury materials to the Civil Division attorneys.

On November 30, 1984, the Antitrust Division sought an order, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, from the United States District Court for the Southern District of New York authorizing the disclosure of information contained in the grand jury record to four named attorneys in the Civil Division, two named attorneys in the United States Attorney's Office, and their designees. The government informed the court that the proposed disclosure would "include[] a description and analysis of the evidence * * * uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury" (J.A. 12). The Division assured the court that the proposed disclosure was for consultation only and "not for purposes of further investigation" by the Civil Division or the United States Attorney (*id.* at 13). The government urged that the need for this limited disclosure to ensure consistent enforcement of federal civil law outweighed the need for continued secrecy (*id.* at 14-15).[3]

[3] As the government explained (J.A. 14-15):

> The disclosure of information is necessary to ensure the proper functioning of the decision-making process of the U.S. Department of Justice. In order properly to exercise its prosecutorial discretion, review of the memoranda by the Civil Division is necessary to ensure that the Department acts consistently in its enforcement efforts. The review is also important to ensure that prosecution of this matter would carry out Department policy regarding the False Claims Act. Moreover, without disclosure of this information, the Antitrust Division would not be able to take full advantage of the Civil Division[']s expertise in enforcing cases under the False Claims Act.
>
> Coordination between the Civil Division[] and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts i[f] its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other divisions. This uniformity of enforcement is necessary not only to the Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

3. Following an ex parte hearing, the district court granted the motion. The court entered a Rule 6(e) order permitting the Antitrust Division to disclose matters occurring before the grand jury to the six specified attorneys (and their designees) in the Civil Division and the United States Attorney's Office in order "to assist in the review of this matter provided that this information will be treated as confidential and its use will be limited solely to the purposes of this order" (Pet. App. 23a).

In the following weeks, the Antitrust Division provided the specified attorneys with four memoranda that analyzed and quoted from documents and testimony presented to the grand jury. Some subpoenaed documents were attached to these memoranda. After analyzing this information and discussing it with attorneys from the Antitrust Division, the Civil Division attorneys advised the Antitrust Division that a

False Claims Act suit would be appropriate. Pet. App. 4a.

B. The Proceedings Below

1. The Antitrust Division ultimately decided to file a civil complaint. In March 1985, as a matter of courtesy, the Division notified the proposed defendants of the upcoming suit (J.A. 44-45). Respondents immediately moved in the district court to vacate the Rule 6(e) order. They also sought to prohibit the government from using any grand jury material in preparing, filing, or litigating the civil suit (Pet. App. 4a; J.A. 27-28). After a hearing,[4] the district court on March 12, 1985, denied the requested relief (Pet. App. 21a). The court stated that "[t]he entire impact of the papers [the government] submitted [at the hearing on the Rule 6(e) order was] to show there was a particularized need" and that government counsel "went through a great deal of trouble to indicate why they were necessary" (J.A. 34). The court also refused to enjoin the government from filing the complaint, or to disqualify the Antitrust Division attorneys who had participated in the grand jury investigation from participating in the civil suit (Pet. App. 21a).[5] Shortly thereafter, the United States filed a civil complaint under seal charging the corporate respondents and another company with (1) bid rigging and price fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1; (2) conspiring to defraud the United States in violation of the False Claims Act, 31 U.S.C. (& Supp. II) 3729-3731; (3) making false claims against the United States, in violation of Section 640A of the Foreign Assistance Act of 1961, 22 U.S.C. 2399b; and (4) unjust enrichment at common law.[6]

2. The court of appeals reversed (Pet. App. 1a-18a). The court ruled that the district court had abused its discretion in granting a Rule 6(e) order because the Antitrust Division had not demonstrated a particularized need for the disclosure of grand jury materials to the Civil Division. The court also held that the Antitrust Division attorneys who had access to grand jury materials during the criminal investigation must obtain a Rule 6(e) order before they

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[4] Respondents' motion was originally assigned to Judge Brieant. He denied the motion without prejudice on the ground that it should be presented to Judge Palmieri, who had issued the Rule 6(e) order (J.A. 29). After a hearing (J.A. 30-42), Judge Palmieri also denied respondent's motion (Pet. App. 21a), and it was his ruling that was later set aside by the court of appeals.

[5] The district court's denial of respondents' motion was "without prejudice to [its] renewal before the trial judge * * * assigned when [the] case is filed" (Pet. App. 21a).

[6] The complaint was filed under seal. After filing a notice of appeal, respondents moved in the court of appeals for a protective order prohibiting the government from using grand jury materials pending appeal in preparing for, filing, or litigating the proposed civil action and prohibiting the Antitrust Division from making any further disclosures to the Civil Division. The court of appeals refused to prohibit the United States from filing its complaint but directed that the complaint be filed under seal pending the resolution of respondents' appeal. Pet. App. 19a. As the court of appeals found, "the complaint filed by the government does not quote from or refer to any grand jury material" (*id.* at 17a). The court also prohibited the disclosure of grand jury material to anyone who was not already privy to the information (*id.* at 20a). See also page II note *, *supra*. A copy of the complaint, as reprinted in the supplemental appendix filed in the court of appeals, has been lodged under seal with the Clerk's Office.

themselves could use the same material in this civil suit.[7]

a. The court of appeals recognized that under *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), the district court was " 'infused with substantial discretion' " in deciding whether to authorize disclosure (Pet. App. 6a (citation omitted)). It also acknowledged that the particularized need standard "is a highly flexible one" that accommodates considerations peculiar to the government " 'that weigh for or against disclosure in a given case' " (*id.* at 7a (citation omitted)). Nonetheless, the court of appeals concluded that the district court's order was improper because the Antitrust Division could eventually have provided the Civil Division with "substantially the same information" by exercising its discovery powers under the ACPA (*id.* at 9a). The Court recognized that this would require the investment of "a substantial amount of additional government time and effort," but it concluded that, under *Sells*, "such a factor can play no part in our analysis" (*id.* at 10a). Finally, despite the very narrow purpose for which disclosure was sought and permitted, the court of appeals stated that it was "influenced" in its assessment of the government's showing of particularized need (*ibid.*) by the fact that neither the government's request for disclosure nor the district court's Rule 6(e) order specified precisely what grand jury materials were to be disclosed (Pet. App. 11a). Accordingly, the court of appeals vacated the Rule 6(e) order.

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[7] The court of appeals rejected respondents' argument that the district court had erred by granting the order on the basis of an ex parte hearing pursuant to Fed. R. Crim. P. 6(e)(3)(D) (Pet. App. 5a-6a).

b. The court then turned to the question whether the Antitrust Division attorneys who had assisted the grand jury during its investigation could, in preparing for and litigating the contemplated civil suit, use grand jury materials to which they had previously had access without first obtaining a Rule 6(e) order (Pet. App. 11a-17a). The court recognized that the "issue presented here is more subtle" than the one decided in *Sells*, in which this Court "expressly left this question unresolved" (Pet. App. 11a-12a). The court of appeals stated that "[t]he threshold question is whether the continued access to grand jury materials by the attorneys who conducted the grand jury investigation—and worked with the materials during that time—even constitutes 'disclosure' " for purposes of Rule 6(e) (Pet. App. 12a). The court acknowledged that it "seems fictional at first glance" to characterize as a "disclosure" an attorney's continued access during a civil suit to grand jury materials that he had reviewed during the grand jury's investigation (*ibid.*). But it concluded that this characterization was justified in this case because the sizeable volume of grand jury materials would invite the government attorneys to refresh their recollection by referring "repeatedly to the documents and transcripts of which they have prior knowledge and with which they may be partially familiar" (*ibid.*).

The court of appeals then discussed the reasons given in *Sells* for limiting access to grand jury materials. Pet. App. 13a-17a. The court recognized that one of these concerns—the threat to the integrity of the grand jury from its potential manipulation as a civil investigative device (see *Sells*, 463 U.S. 432-433)—was "largely absent" given the Antitrust Division's extensive discovery powers under the ACPA

(Pet. App. 13a-14a).[8] For the same reason, the court held that a second concern identified in *Sells*—that permitting use of grand jury materials in preparing civil litigation would subvert limitations on discovery power outside the grand jury setting (see 463 U.S. at 433)—had little force here (Pet. App. 14a-15a).

Nonetheless, the court of appeals concluded that the general secrecy concerns discussed in *Sells*—the risk of an illegal or inadvertent disclosure, and the risk that disclosure would inhibit the candor of grand jury witnesses (see 463 U.S. at 432)—did apply here (Pet. App. 15a-17a). The court said it was not seriously concerned about the "limited disclosure" resulting from the attorneys' continuing access to the grand jury materials (*id.* at 15a). But it noted that "support employees"—*i.e.*, paralegals and secretaries—would also presumably have access to grand jury materials, and that "any such disclosure, even if not in itself in violation of the statute, would increase the risk of inadvertent disclosure" (*id.* at 16a). The court also believed that allowing continued access under the circumstances of this case would cause grand jury witnesses to "be less willing to speak candidly before the grand jury" (*ibid.*). The court recognized that "[o]n balance * * * the threat of affirmative mischief * * * is somewhat less than * * * in *Sells*," and confessed that it was "tempted to conclude that the [government] need not seek a rule 6(e) order"

[8] Section 1312(a) (15 U.S.C.) provides that the Attorney General or Assistant Attorney General for the Antitrust Division may, before a civil complaint is filed, require any person to produce documentary materials, give written answers to interrogatories, provide oral testimony, or furnish any combination of the above, whenever he has reason to believe this information is relevant to a civil antitrust investigation.

in this case (Pet. App. 16a). Nevertheless, the court of appeals felt compelled to rule in respondents' favor because of "the reluctance imposed on us from above" (*id.* at 16a-17a), despite the "minimal * * * threat here" to grand jury secrecy (*id.* at 17a). The court therefore "prohibit[ed] any further access to or use of grand jury materials * * * unless and until" the government obtained a Rule 6(e) order (Pet. App. 17a).[9]

SUMMARY OF ARGUMENT

I. The first question in this case was expressly reserved in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 431 n.15 (1983): whether a Department of Justice attorney who participated in grand jury proceedings may make continued use of the grand jury materials in preparing and litigating an ensuing civil case without obtaining a Rule 6(e) order, so long as he does not disclose the materials to any other person.

The government and the public have a strong interest in an affirmative answer to this question. There are many cases in which, after a criminal investigation is completed, it is appropriate for the Department to consider civil proceedings in addition to or instead of criminal prosecution. Requiring the Department to duplicate the grand jury materials through civil discovery would impose a substantial additional burden on both the government and the interested private persons. Even more important, the resulting delay would force many civil cases in

[9] The court of appeals rejected respondents' claim that the mere filing of the government's civil complaint, which "does not quote from or refer to any grand jury materials," was itself an unauthorized "disclosure of grand jury material" (Pet. App. 17a).

the public interest to be dropped because of staleness or statutes of limitations.

By its plain terms, Rule 6(e) permits continued use of grand jury materials, in the civil phase of a dispute, by the attorneys who participated in the grand jury proceedings. Rule 6 expressly contemplates that certain categories of persons, including the participating government attorneys, will be privy to the grand jury proceedings and have access to the grand jury materials. Rule 6(e)(2) provides that such attorneys, and certain other persons, "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule." Since an attorney's continued private use of materials to which he had prior lawful access is not a "disclosure," it is permitted by the plain meaning of the Rule.

The court of appeals, admitting that it "seems fictional" to do so (Pet. App. 12a), ruled that government attorneys' resort to grand jury materials "to refresh their recollection * * * is tantamount to a further disclosure" (*ibid.*). That ruling is contrary to the plain meaning of the word "disclose," which means "expose to view," not "reexamine." It is also, we respectfully submit, contrary to common sense: an attorney obviously may make "continued use" (for planning purposes and without further disclosure) of matters occurring before the grand jury that he is able to recall from memory; his equally private act of reviewing the same information in written form is no more a "disclosure" than his reliance on his memory.

The history of Rule 6(e) confirms its plain meaning. It has been the Department's longstanding practice, noted by this Court without criticism in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 678 (1958), to permit the attorneys who participated in grand jury proceedings to "us[e] the grand jury materials to prepare the [civil] case for trial." Although Rule 6(e) has been amended several times since 1958, there is not the slightest evidence that Congress believes that the Department's well known practice violates the Rule or threatens grand jury secrecy.

The court of appeals, after reviewing the policies underlying Rule 6(e), said "we might be tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material to litigate this civil action. But, however minimal the threat here, the reluctance imposed on us from above [in *Sells*] forces" the opposite result (Pet. App. 17a). The court was correct in its view that the threat is "minimal," but was incorrect in its reading of *Sells*.

There is, as the court of appeals recognized, no threat to secrecy from "continued access by those antitrust division attorneys who actually carried out the grand jury investigation here" (Pet. App. 15a). And while paralegal and secretarial personnel may handle such materials under the attorney's supervision, that is not a violation of the Rule, and the risk of disclosure by such a person (which would be punishable by contempt) is no greater than it would be if there were a criminal prosecution. Finally, the court of appeals correctly concluded that the policies, discussed at length by the Court in *Sells*, of protecting the integrity of the grand jury and preventing circumvention of limitations on civil discovery, have no bearing on this case, because of the Antitrust Division's extensive civil discovery powers. In view of

the absence of any incentive to abuse of the grand jury process where the only persons who may see grand jury materials are those who conducted the proceedings, and the ease with which any abuse can be remedied in a "continued use" case, we submit that these concerns have no bearing in other continued use cases either.

II. The second question presented in this case is whether the court of appeals correctly decided that the "substantial amount of additional government time and effort" required for duplicative civil discovery "can play no part in [the] analysis" of whether the government has shown a "particularized need" justifying a Rule 6(e) order. The effect of this ruling, also purportedly based on *Sells*, is to prevent the government from obtaining a Rule 6(e) order in *any* case in which grand jury materials are available from another source, however expensive it may be and however long it might take to obtain duplicate materials.

The court's holding was a misreading of *Sells*. This Court there rejected the argument that "saving time and expense" justifies dispensing entirely with the requirement of a Rule 6(e) order before disclosure to additional lawyers. 463 U.S. at 431. But nowhere did the Court suggest that time and expense "can play no part" in the district court's exercise of its "substantial discretion" to decide whether a Rule 6(e) order is appropriate in a particular case. On the contrary, *Sells* expressly endorsed the disclosure standard previously adopted in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), which *Sells* described as "a highly flexible [standard], adaptable to different circumstances" (463 U.S. at 445).

The court's holding that no Rule 6(e) order may issue for materials obtainable, with whatever delay and expense, from other sources is also wholly illogical. The ruling would flatly prohibit use of grand jury materials on precisely those occasions when there is no reason whatever to do so, because neither the secrecy nor the integrity of the grand jury is at stake. Its only effect would be to impose a substantial additional burden on the enforcement of federal law in civil proceedings.

ARGUMENT

I. THE CONTINUED USE OF GRAND JURY MATERIALS, IN THE CIVIL PHASE OF A DISPUTE, BY A GOVERNMENT ATTORNEY WHO PARTICIPATED IN THE GRAND JURY PROCEEDINGS DOES NOT CONSTITUTE A "DISCLOSURE" OF MATTERS OCCURRING BEFORE THE GRAND JURY WITHIN THE MEANING OF FED. R. CRIM. P. 6(e)

A. Introduction

Many important federal statutes, including the Sherman Act, provide for both criminal prosecution and civil proceedings against violators.[10] In addition,

[10] Such statutes can be found in the following areas, for example: (1) false claims: civil, 31 U.S.C. (& Supp. II) 3729; criminal, 18 U.S.C. 287, 1001 *et seq.*; (2) antitrust laws: civil, 15 U.S.C. 9, 15a, 6; criminal, 15 U.S.C. 1, 2, 3, 8; (3) odometer tampering: civil, 15 U.S.C. 1990b; criminal, 15 U.S.C. 1990c; (4) hazardous substances: civil, 15 U.S.C. 1265; criminal, 15 U.S.C. 1264; (5) consumer credit: civil, 15 U.S.C. 1607; criminal, 15 U.S.C. 1611; (6) motor vehicle standards: civil, 15 U.S.C. 1398(a), 1415(c); criminal, 15 U.S.C. 1399(b); (7) adulterated foods, drugs, and cosmetics: civil, 21 U.S.C. 332; criminal, 21 U.S.C. 333; (8) fair housing laws: civil, 42 U.S.C. 3613; criminal, 42 U.S.C. 3631; (9) wage and hour laws: civil, 40 U.S.C. 328; criminal, 40 U.S.C. 332; (10) quarantine rules for ships: civil, 42 U.S.C. 271(b);

violations of criminal statutes often give rise to civil claims for damages owing to the government or to other victims. As a result, the Department of Justice must frequently decide, after a grand jury has completed its investigation of a possible crime, whether to bring a civil suit based on the same facts. The first question in this case is whether, when the same Department of Justice attorneys who participated in the grand jury proceedings are assigned to consider and prepare a civil case, they may continue to use the grand jury materials (without disclosing them to any additional persons) without a court order under Rule 6(e) of the Federal Rules of Criminal Procedure.

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 18 (1983), the Court held that Rule 6(e) prohibits the disclosure of grand jury materials to Department of Justice attorneys who were *not* involved in the grand jury proceedings unless the government obtains a court order based on a showing of particularized need. The Court expressly declined to address "the continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15.[11]

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criminal, 42 U.S.C. 271(a); (11) voting rights: civil, 42 U.S.C. 1973j(d) and (e); criminal, 42 U.S.C. 1973i, 1973j(a), (b) and (c); water pollution control: civil, 33 U.S.C. 1319(b) and (d); criminal, 33 U.S.C. 1319(c).

[11] Chief Justice Burger's dissent stated that "it is reasonable to read today's decision as allowing any Justice Department attorney who has participated in the grand jury investigation or prosecution—and thus already has had access to the grand jury materials—to make further use of those materials in preparing and litigating a related civil case." 463 U.S. at 473.

In the present case, the court of appeals ruled that Antitrust Division attorneys who participated in grand jury proceedings and had lawful access to the grand jury materials may not review those materials in preparing a related civil case without a Rule 6(e) order. The court of appeals acknowledged that it was "tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material to litigate this civil action" (Pet. App. 16a-17a). But the court concluded, citing *Sells*, that "the reluctance imposed on us from above" (Pet. App. 17a) forced it to deny the Antitrust Division such continued use. This ruling, we respectfully submit, misreads both Rule 6(e) and the policy of secrecy, articulated in *Sells*, that underlies the rule.[12]

Rule 6(e) does not, by its plain terms, prohibit continued use of grand jury materials, in the civil phase of a dispute, by government attorneys who have had prior lawful access to them, so long as they make no disclosure to other persons. Rule 6(e) expressly contemplates that certain categories of persons, including the government attorneys participating in the proceedings, will be privy to the grand jury materials. Its "General Rule of Secrecy" prohibits disclosure of matters occurring before the grand jury *by*

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[12] The court also held, again citing *Sells*, that the "substantial amount of additional government time and effort" required to duplicate grand jury materials through civil discovery "can play no part" (Pet. App. 10a) in the analysis of whether the government has made the showing of "particularized need" required to obtain a Rule 6(e) order. This second holding is discussed below at Point II. The two rulings would together make it impossible to make any continued use of the grand jury materials in any case where the materials are available (with whatever delay and at whatever cost) from any other source.

those persons to *other* persons. No such disclosure occurs when an attorney for the government who has participated in the grand jury proceedings, and has had access to the grand jury materials, continues to use them in the investigation and litigation of a civil claim. Such continued use of the materials, without further disclosure, does not enlarge the number of people "inside the circle" or otherwise threaten grand jury secrecy.

On the other hand, the government and the public have a strong interest in the government's being able to make continued use of grand jury materials in the civil phase of a dispute when the government can do so without additional disclosure. The expense (not only to the government and the taxpayers but also to other parties and witnesses) of duplicating a grand jury investigation through civil discovery (or other available means) would often be enormous.[13] The lapse of time, if the government were required to duplicate a completed grand jury investigation through civil discovery, would mean that both sides face unnecessarily prolonged uncertainty and that many important cases in the public interest would not be brought at all, because of problems of staleness and statutes of limitations.[14] And if the attorneys who participated in the grand jury proceedings were not permitted to use the grand jury materials in the civil phase of a dispute, in many cases those attor-

[13] In this case, for example, the grand jury heard testimony from dozens of witnesses and obtained approximately 250,000 pages of documents before the decision was made not to seek an indictment. Pet. App. 2a.

[14] See Pet. App. 17a (noting that the statute of limitations apparently barred prosecution of one of the government's civil claims).

neys could not, as a practical matter, participate in the civil phase at all, because they would be vulnerable to challenges (brought in good faith or otherwise) alleging their improper reliance on grand jury materials.[15]

[15] Indeed, the question of such total disqualification was touched on below. The court of appeals said (Pet. App. 17a): "Since it would be almost impossible for any attorney in such a position to compartmentalize his thoughts and litigate a civil case without in some way using his recollection of facts learned during the grand jury investigation, we think that the real question [not presented here] is whether the prosecutor must be disqualified from litigating the civil case. Since appellants have expressly declined to present that issue, we are not called upon to address it." In *United States* v. *Archer-Daniels-Midland Co.*, 785 F.2d 206 (8th Cir. 1986), petition for cert. pending, No. 85-1840, the court addressed that question and held, "[w]e do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered disclosure" within the meaning of Rule 6(e). 785 F.2d at 212.

There are, we suggest, four points: (1) Any ruling disqualifying prosecutors from participating in related civil cases would impose a severe burden on enforcement efforts, particularly in Divisions and Offices of the Department that are small or are organized by subject matter. (2) Reliance by an attorney on his recollection of matters occurring before the grand jury simply is not "disclosure" (unless he discloses his recollection to another person) and therefore is not prohibited by Rule 6(e) under any plausible reading. (3) If an attorney may rely on his recollection of matters occurring before the grand jury, then no purpose is served by preventing him from reviewing grand jury materials (in private and without disclosure to any other person), and of course such review does not fall within the plain meaning of "disclosure." (4) Conversely, if any attorney who has had access to grand jury materials is not permitted to review them in preparing a civil case, the government may in many cases be well advised not to use him, lest repeated challenges to his sources of informa-

The Antitrust Division, the Civil Division, and many United States Attorney's offices often use the same attorneys in successive, related criminal and civil matters. This practice is common, for example, in the Antitrust Division, because line attorneys are assigned to sections that are responsible for specific industry groups.[16] The Civil Division also has enforcement responsibilities with respect to conduct that may be prosecuted in either a criminal or civil action, and the same attorneys are, whenever possible, assigned to work on successive related matters. Smaller United States Attorneys offices follow this practice as a matter of necessity, because there are simply not enough attorneys to permit double staffing. The major changes in the government's longstanding practice that would be required under the court of appeals' decision are both unnecessary and unwise.

B. The Plain Text Of The Rule

The starting point in construing a federal rule of procedure, like the starting point in construing a statute, is the language employed by Congress. See *Schiavone* v. *Fortune*, No. 84-1839 (June 18, 1986), slip op. 9 (Fed. R. Civ. P. 15(c)); see also *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 84-648 (July 1, 1985), slip op. 8; *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). As the Court stated in *Schiavone*, "[w]e do not have before us a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a

tion (which may be hard to put out of court when the attorney has been thinking, conversing, making notes, and collecting files about the same set of events over a long period of time) delay and obstruct the civil proceedings.

[16] U.S. Dep't of Justice, *Antitrust Division Manual* I-22-23 (rev. 1982); see also J.A. 17.

'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." Slip op. 9.

Rule 6(e) plainly does not prohibit continued use of grand jury materials, without disclosure, by government attorneys who participated in the grand jury proceedings and had lawful access to those materials in that capacity. The Rule contemplates that certain persons, including participating government attorneys, may have access to grand jury materials.[17] The "General Rule of Secrecy" in Rule 6(e)(2) then provides that specified persons, including such attorneys, "shall not disclose matters occurring before the grand jury * * *." The following sentence states that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." By its terms, therefore, Rule 6(e) prohibits only "disclosure" of matters occurring before the grand jury; it does not forbid the continued use of grand jury materials by government attorneys who do not disclose them to others.

The court of appeals, admitting that it "seems fictional at first glance" (Pet. App. 12a), held that the attorneys' review of materials constitutes a "disclosure." That ruling is contrary to this Court's instruction to assume that "the ordinary meaning of the language that Congress employed 'accurately ex-

[17] Under Rule 6(d), only the attorneys for the government, the witness under examination, the stenographer or operator of a recording device, and, when necessary, interpreters are permitted to be present while the grand jury is in session. Rule 6(d) forbids anyone other than the grand jurors themselves from attending the grand jury's deliberations or vote.

presses the legislative purpose.'" *Mills Music, Inc.* v. *Snyder*, No. 83-1153 (Jan. 8, 1985), slip op. 10 (citation and footnote omitted); see also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). The ordinary meaning of "disclosure" does not include review of materials by persons who have had prior access to them. The word "disclose," which is not defined in the Rule, means "to open up[,] to expose to view[,] * * * [to] open up to general knowledge" (*Webster's Third New International Dictionary* 645 (1976)), and "to make known or public * * * something previously held close or secret" (*Webster's New Collegiate Dictionary* 325 (1975)). As the Eighth Circuit recently explained, "[f]or there to be a disclosure [under Rule 6(e)], grand jury matters must be disclosed to *someone*" (*United States* v. *Archer-Daniels-Midland Co.*, 785 F.2d 206, 212 (8th Cir. 1986) (emphasis in original), petition for cert. pending, No. 85-1840). When a government attorney has participated in grand jury proceedings and has therefore had lawful prior access to the grand jury materials, his continued use of them does not constitute a "disclosure" within the ordinary meaning of that term, because the materials are not opened up to the view of any additional individual.[18] Nothing is made "known or public" that was "previously held close or secret."

[18] The initial grant of access to the grand jury materials to the attorney participating in the grand jury proceedings *is* a disclosure within the meaning of Rule 6(e) and is authorized by paragraph (3)(A)(i) of the Rule. As the Court noted in *Sells*, such access is properly granted not only to "those prosecutors who actually *did* appear before the grand jury," but also to "anyone working on a given prosecution [because each such person] would clearly be *eligible* under Rule 6(d) to enter the grand jury room, even if particular individuals did not have occasion to do so." 463 U.S. at 429 n.11 (emphasis in original). Thus, disclosure—the affording of access—has been made to any attorney who was part of "the *prosecution* team" (*Sells*, 463 U.S. at 429 n.11 (emphasis in original)).

The court of appeals reasoned, however, that, because the quantity of grand jury materials in this case was too great for any person to commit to memory, the attorneys preparing the civil suit would need to refer to at least some of these materials. The court then ruled that "any resort to these materials by the attorneys * * * to refresh their recollection * * * is tantamount to a further disclosure" (Pet. App. 12a).[19]

But "disclosure" is the act of exposing materials to view, not the act of viewing. The Antitrust Divi-

[19] The only support the court of appeals cited for its conclusion that continued access amounted to disclosure was the statement in the Ninth Circuit's opinion in *Sells* that "'[e]ach day this order remains effective the veil of secrecy is lifted higher * * * by the continued access of those to whom the materials have already been disclosed.'" Pet. App. 12a-13a (asterisks in original) (quoting *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981), aff'd, 463 U.S. 418 (1983)). But the Ninth Circuit was making an entirely different, and irrelevant, point. In *Sells*, the government attorneys who handled the grand jury investigation physically handed over grand jury materials to Civil Division attorneys who had not appeared before the grand jury. The passage quoted above simply responded to the government's mootness argument (which was based on the fact that the transfer of materials had already occurred) by pointing out that, to the extent that attorneys who had not appeared before the grand jury continued to review materials with which they were unfamiliar, "the veil of secrecy is lifted higher." The Ninth Circuit's words ("have already been disclosed") correctly treat the disclosure as having occurred when the materials were made available to the Civil Division, not when they were read sometime later.

sion attorneys involved in this civil suit participated in the grand jury proceedings and were given access at that time to the grand jury materials. The grand jury materials were therefore "disclosed" to these attorneys when they participated in the grand jury's proceedings.[20] Their continued use of these materials does not involve a "disclosure" unless they reveal them to someone else. Otherwise, nothing "is made known or public * * * [that was] previously held close or secret" because the government attorney was already a party to the secret.

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[20] The basis of a government attorney's right to continue to use documents in civil proceedings is, of course, his prior lawful access to *those documents* under paragraph (3)(A)(i) of Rule 6(e). We do not mean to suggest that mere knowledge of information contained in a document entitles anyone to obtain the document itself without a Rule 6(e) order. The clearest example of this point is the well settled rule that a witness is not entitled to a copy of his grand jury testimony on demand, even though he obviously was present in the grand jury room during the receipt of evidence, since a rule of automatic access would expose grand jury witnesses to potential intimidation. See *Executive Securities Corp.* v. *Doe*, 702 F.2d 406, 408-409 (2d Cir.), cert. denied, 464 U.S. 818 (1983); *United States* v. *Clavey*, 565 F.2d 111, 114 (7th Cir. 1977), vacated, 578 F.2d 1219 (1978) (en banc), cert. denied, 439 U.S. 954 (1979); *In re Bianchi*, 542 F.2d 98, 100 (1st Cir. 1976); *Bast* v. *United States*, 542 F.2d 893, 896 (4th Cir. 1976); *United States* v. *Fitch*, 472 F.2d 548, 549 & n.6 (9th Cir.), cert. denied, 412 U.S. 954 (1973); *In re Bottari*, 453 F.2d 370, 371 (1st Cir. 1972); *Valenti* v. *United States Department of Justice*, 503 F. Supp. 230, 233-234 (E.D. La. 1980); *In re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282 (S.D. Fla. 1974); *In re Alvarez*, 351 F. Supp. 1089 (S.D. Cal. 1972); *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 106, at 247 (2d ed. 1982). Contra, *In re Minkoff*, 349 F. Supp. 154 (D.R.I. 1972); *In re Russo*, 53 F.R.D. 564, 568-573 (C.D. Cal. 1971).

Nor does it make sense to treat an attorney's review of materials previously disclosed to him as a "disclosure." Obviously, an attorney can make "continued use" of any information that he learned and committed to memory while participating in grand jury proceedings, because his later recollection does not involve a further "disclosure."[21] It would make no sense to treat his equally private act of reviewing the same information in written form as a "disclosure."

Rule 6 implements the principle that grand jury proceedings should remain secret in two related ways. First, Rule 6(d) identifies and limits the persons who may be present before the grand jury while it is in session. Second, Rule 6(e)(2) prohibits those persons (except witnesses) and some others from disclosing "matters occurring before the grand jury." The text of Rule 6 thus indicates that secrecy is breached when a disclosure of matters occurring before the grand jury is made to a person who did not have lawful access to the grand jury proceedings. That is not what is involved here. The government attorneys who participated in the grand jury investigation were in the grand jury room and were also aware of the "matters" that occurred before the grand jury. Their subsequent review of grand jury documents and testimony therefore does not expand the scope of their initial, lawful use of grand jury materials and thus does not breach the secrecy concerns underlying Rule 6(e).

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[21] See *United States* v. *Archer-Daniels-Midland Co.*, 785 F.2d at 212: "We do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered [a] disclosure" within the meaning of Rule 6(e).

C. The History Of Rule 6(e)

Given the clear meaning of the term "disclosure" in Rule 6(e), only the most extraordinary showing of a contrary legislative intent would justify departing from the "plain meaning" of that term. See *United States* v. *James*, No. 85-434 (July 2, 1986), slip op. 8; *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). The history of Rule 6(e), however, does not contradict the import of its plain language.

It has been the longstanding position of the Department of Justice that if a grand jury investigation is closed, the attorneys who participated in the grand jury proceedings may, without obtaining a court order, review grand jury materials, to which they have had prior access, when they consider and prepare a subsequent civil suit.[22] This Court's awareness of the government's practice was clearly reflected in its opinion in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), in which the Court noted, without criticism, that "the Government is using the grand jury transcript to prepare the case for trial." *Id.* at 678.[23] Since *Procter & Gamble*, the Rule has been repeatedly amended without any indication of congressional disagreement with the Department's practice. Neither the advisory committee notes to the subsequent amendments to Rule 6(e)[24] nor the legislative history of the 1977 congressional revisions of the Rule[25] indicates any congressional perception that the Department's practice threatens grand jury secrecy or otherwise violates Rule 6(e).

[22] See *Sells*, 463 U.S. at 455-460 (Burger, C.J., dissenting).

[23] In *Procter & Gamble*, the Court held that the defendants in a civil antitrust suit brought by the government must demonstrate a particularized need to obtain grand jury material for use in the suit. The Court also ruled that the government may not initiate grand jury proceedings solely for the purpose of advancing a civil investigation. 356 U.S. at 683-684. The Court did not, however, disapprove the government's civil use of grand jury materials where the grand jury was used "for strictly criminal purposes" (*Sells*, 463 U.S. at 434 n.19). See *Procter & Gamble*, 356 U.S. at 683-684.

D. The Policies Underlying Rule 6(e)

The court of appeals reviewed the policy considerations underlying this Court's decision in *Sells*. Its overall conclusion was that "we might be tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material to liitgate this civil action. But, however minimal the threat here, * * * the reluctance imposed on us from above forces us to reinforce the principle of grand jury secrecy" (Pet. App. 16a-17a). A review of the policy considerations demonstrates, however, that the threat posed by continued use of grand jury materials, in the civil phase of a dispute, by an attorney who participated in the grand jury proceedings is indeed

[24] See Notes of Advisory Committee on Rules (1966 Amendment), 18 U.S.C. App. at 568, Notes of Advisory Committee on Rules (1977 Amendment), 18 U.S.C. App. at 569; Notes of Advisory Committee on Rules (1979 Amendment), 18 U.S.C. App. at 570-572; Notes of Advisory Committee (1983 Amendment), 18 U.S.C. (Supp. I) App. at 446-448; Notes of Advisory Committee (1985 Amendment), 18 U.S.C.A. Rule 6, at 79-80 (West 1986).

[25] See S. Rep. 95-354, 95th Cong., 1st Sess. (1977); H.R. Rep. 95-195, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. 11108-11112 (1977) (House debate); *id.* at 24641-24642 (Senate debate); *id.* at 25193-25196 (House debate on Senate amendments).

"minimal," and certainly is not sufficient to overcome the plain meaning of the rule and the importance of such continued use to the effective enforcement of federal law in cases with both criminal and civil phases.

1. *Secrecy*

The most important purpose of Rule 6(e) is, of course, to preserve the secrecy of grand jury proceedings themselves. The Court has often recognized that Rule 6(e) codifies an important, deeply-rooted policy, stemming from the common law, that grand jury proceedings should remain secret in order to enable the grand jury to perform its integral role in the criminal process. See *Sells*, 463 U.S. at 423-425; *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 566-567 n.11, 572-573 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 & n.9, 222 (1979); *United States* v. *Procter & Gamble Co.*, 356 U.S. at 681-682 & n.6 (quoting *United States* v. *Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954)). Many of the most important reasons for maintaining grand jury secrecy are no longer applicable when (as in any case presenting this question) the grand jury proceedings are over and the dispute is in its "civil phase," and when it is the government, rather than a private party, that seeks access to the materials.[26] But secrecy remains the primary purpose of the Rule.

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[26] In such cases, there is no reason to fear that disclosure will hamper the operation of the grand jury, allow a suspect to flee, or facilitate tampering with grand jury witnesses or with the grand jurors themselves. Witnesses will also have no reason to fear that they will be subject to intimidation or retaliation because of their testimony before the grand jury. See *Abbott*, 460 U.S. at 566-567 n.11; *Douglas Oil*, 441 U.S. at 222; 8 J. Wigmore, *Evidence in Trials at Common Law* § 2360, at 734-735 (McNaughton rev. ed. 1961); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 106, at 244 (2d ed. 1982); see also *Dennis* v. *United States*, 384 U.S. 855, 872 n.19 (1966); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-234 (1940).

The court of appeals was, appropriately, unconcerned about continued use of grand jury materials by the government attorneys themselves: "[i]f it only involved continued access by those antitrust division attorneys who actually carried out the grand jury investigation here, then the disclosure would admittedly be limited" (Pet. App. 15a). Since such continued use involves *no* increase in the number of persons with access to the materials, even this modest statement exaggerates the threat. The court of appeals was, however, concerned about the risk of an illegal or inadvertent disclosure of grand jury materials by paralegal and clerical support personnel assisting the Antitrust Division's attorneys in handling such materials (*id.* at 15a-16a). The court said that allowing such personnel to handle grand jury materials would substantially increase the risk of an illegal or inadvertent disclosure to others (*id.* at 16a).[27]

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[27] The court of appeals also believed that under Rule 6(e)(3)(A)(ii) such support personnel could not handle grand jury materials in connection with a civil case without a Rule 6(e) order. If the court of appeals were correct, the role of support personnel would provide no argument whatever for denying continued use by attorneys: support personnel could not handle grand jury materials unless authorized by a court order. We believe, however, that a paralegal or secretary may handle materials that have been disclosed to the supervising attorney, under his or her supervision, without a court order, and that paragraph (3)(A)(ii), added in 1977, addresses quite a different problem.

Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by Rule 6(e) may be made to "such government

But the court's speculation about additional risk of disclosure by paralegal or clerical personnel is unfounded. If, as will presumably be the case, the paralegal or secretary worked with the attorney in the grand jury proceedings, no disclosure to any new person occurs when he or she continues to assist in a later civil investigation. The risk of disclosure *by* such a paralegal or secretary (which would be punishable as contempt) is no greater than it would be if there were a criminal prosecution, where such support personnel are permitted to continue to handle grand jury materials to which the supervising attorney has access. And the possibility of an occasional change in the identity of such personnel does not materially change the practical risk. In the anal-

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personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." See page 2, *supra*. As this Court noted in *Sells*, this amendment was necessary "because Justice Department attorneys found that they often needed advice from *outside* personnel—not only investigators from the Federal Bureau of Investigation, IRS, and other law enforcement agencies, but also accountants, handwriting experts, and other persons with special skills." 463 U.S. at 436 (emphasis added). The advisory committee notes and congressional reports to Rule 6(e)(3)(A)(ii) show that it was adopted to permit attorneys to reveal grand jury materials to assistants such as auditors, investigators, or attorneys from federal agencies. See 18 U.S.C. App. at 566, 569-570; S. Rep. 95-354, *supra*, at 6-7; H.R. Rep. 95-195, *supra*, at 3-4. There is no hint in the legislative history that this subsection of the Rule was necessary or designed to allow secretaries, paralegals, or similar support personnel to handle grand jury materials. The court of appeals therefore erred in concluding that the disclosure of grand jury materials *to* such persons would violate Rule 6(e)(3)(A)(ii).

ogous situation of the attorney-client privilege, a lawyer's secretary and support staff are universally (and sensibly) viewed as a necessary extension of the attorney, and the communication of a client's confidences to such persons therefore does not destroy the privilege.[28] The need of attorneys to rely on secretarial and paralegal support should not have caused the court of appeals to abandon the sensible rule that an attorney to whom materials have been disclosed may continue to use them in the civil phase of the dispute.

The court of appeals also mentioned briefly the risk that the possibility of use of grand jury materials by the same government attorneys in civil litigation might have a chilling effect on the willingness of grand jury witnesses to testify candidly (Pet. App. 16a; see *Sells*, 463 U.S. at 432). That risk, however, seems negligible: a witness not "chilled" by the risk that his testimony might be disclosed under the Jencks Act, 18 U.S.C. 3500,[29] or a Rule 6(e) order, or the risk that a prosecutor with a good memory could rely on his recollection of that testimony in

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[28] See, *e.g.*, *United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 40 (D. Md. 1974); *Zenith Radio Corp.* v. *RCA*, 121 F. Supp. 792, 794 (D. Del. 1954); *People* v. *Williams*, 97 Ill. 2d 252, 454 N.E.2d 220 (1983); *Taylor* v. *Taylor*, 179 Ga. 691, 177 S.E. 582 (1934); *State* v. *Krich*, 123 N.J.L. 519, 9 A.2d 803 (1939); 2 D. Louisell & C. Mueller, *Federal-Evidence* § 209, at 754 (1985); C. McCormick, *Evidence* § 91, at 218 (3d ed. 1984); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 503(a)(3)[01], at 503-524 (1985); 8 J. Wigmore, *supra*, § 2301, at 583.

[29] The Jencks Act allows disclosure of the testimony of witnesses before the grand jury to criminal defendants for use at trial.

preparing a later civil suit, or the risk that the same testimony could be compelled under the Antitrust Civil Process Act, 15 U.S.C. 1311-1314, is unlikely to be chilled by the modest additional risk that the same attorneys may continue to use grand jury materials in the civil phase of a dispute. We recognize that, in *Sells*, the Court gave some weight to the possible chilling effect of this additional use of the material;[30] we respectfully suggest that any slight additional risk of chill that may be present in a "continued use" case, where the civil use may only be made by the same attorneys, simply cannot outweigh the benefits to the enforcement of federal law in civil proceedings.

Grand jury secrecy is undeniably important, but its importance does not justify extending the reach of Rule 6(e) beyond what Congress intended merely to "reinforce" (Pet. App. 17a) the purposes that the Rule serves. As this Court recently noted, the "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address." *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. *Sells* was not a mandate to expand the scope of Rule 6(e) to reinforce in some unspecified way the principle of grand jury secrecy. This Court has never "exalt[ed] the principle of secrecy for secrecy's sake" in grand jury cases (*Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 407 (1959) (Brennan, J., dissenting)). Continuing access by a limited number of

[30] See 463 U.S. at 432 (noting that if automatic disclosure were allowed, grand jury testimony would be "routinely available" for use in civil suits, thus "render[ing] considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly").

attorneys who assisted a grand jury in its investigation presents no serious threat to the interests safeguarded by grand jury secrecy. In stating that the "reluctance imposed on us from above forces us to reinforce the principle of grand jury secrecy" (Pet. App. 17a) by requiring the Antitrust Division attorneys in this case to obtain a Rule 6(e) order, the court of appeals misread *Sells* and exalted the principle of secrecy for secrecy's sake.

2. *Integrity of the grand jury*

In *Sells*, this Court also identified as policy concerns underlying Rule 6(e) the need to protect the integrity of the grand jury against misuse as a civil investigative device and the need to prevent circumvention of limitations on civil discovery. See 463 U.S. at 432-434. The court of appeals found that those considerations were inapplicable in this case, saying "we do not view either of the last two problems in *Sells* as reasons to require a Rule 6(e) order here." This ruling was correct.

The premise for allowing the attorneys who participated in grand jury proceedings to continue to use grand jury materials in the civil phase of a dispute is, of course, that the grand jury was convened and used solely for bona fide criminal investigative purposes. No one questions the bona fides of the grand jury investigation in this case.

As the court of appeals recognized (see Pet. App. 9a), the Antitrust Division has extensive precomplaint discovery powers under the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314. See *Associated Container Transp. (Australia), Ltd.* v. *United States*, 705 F.2d 53 (2d Cir. 1983). These powers eliminate any need, and therefore any incen-

tive, to abuse the grand jury process to generate evidence for a civil suit. The ACPA empowers the Antitrust Division, before a civil complaint is filed, to demand documentary evidence (15 U.S.C. 1312(b)(2)), answers to written interrogatories (15 U.S.C. 1312 (b)(3)), or oral testimony (15 U.S.C. 1312(b)(4)), of "any person" who may "have any information[] relevant to a civil antitrust investigation" (15 U.S.C. 1312(a)). The statute provides for nationwide service of process (15 U.S.C. 1312(d)(2)), and recalcitrant witnesses may be compelled to testify (15 U.S.C. 1312(i)(7)(B)). Conducting a grand jury investigation, in our experience, involves considerably more effort and expense than civil discovery under the ACPA. The court of appeals was therefore correct in concluding that the Antitrust Division would "gain little by instigating a grand jury investigation for the purpose of gathering evidence for a civil proceeding, when it could gather that same information" under the ACPA (Pet. App. 14a).

Even in cases not involving the Antitrust Division there is no reason to fear abuse of the grand jury process.[31] In a "continuing use" case, the fear expressed in *Sells* (463 U.S. at 431-432) that one set of attorneys might use the grand jury to compile "a storehouse of evidence" so that their "colleagues would be free to use the materials generated * * * for a civil cause," simply does not apply. The attorneys participating in the grand proceedings have no such incentive because any future civil use is limited to refreshing their own memories (without disclosure) if they happen to be assigned to the civil case.

[31] The Court said in *Sells*, 463 U.S. at 432, "[w]e do not mean to impugn the professional characters of Justice Department lawyers in general."

If the same attorneys do conduct the civil case they can be held responsible for their own good faith in conducting the prior grand jury proceedings. And if there is a basis for challenge to the bona fides of the grand jury proceedings, the attorneys responsible for those proceedings are, by hypothesis, immediately available to be called on to respond in the civil case.[32]

[32] The question may be asked why Rule 6(e) orders should be dispensed with in "continued use" cases rather than merely granted, after hearing, under a standard that takes appropriate account of the burdens of duplicative discovery. There are four answers. First, of course, the plain meaning of Rule 6(e) simply does not require a Rule 6(e) order in these circumstances. Second, the requirement of a Rule 6(e) order not only imposes a substantial burden of time and effort but also (because a case frequently cannot proceed at all until the matter is resolved) affords defendants the means to impose repeated lengthy delays by litigating the correctness of Rule 6(e) orders that are granted and the need for Rule 6(e) orders that are not sought; the present case, which has been delayed more than a year by this litigation, is an excellent example. (It should be noted that although the Second Circuit held in this case that Rule 6(e) hearings can be conducted ex parte, other courts have said that ex parte proceedings are disfavored: see *In re Doe*, 537 F. Supp. 1038, 1042 (D.R.I. 1982).) Third, even if this court were to articulate an appropriate standard, lower courts will of course debate, disagree, and sometimes err in applying that standard, effectively denying continued use in cases where it should be permitted. Fourth, and perhaps most important, there is no function for the Rule 6(e) hearing to perform: the question whether it is appropriate for attorneys who have conducted grand jury proceedings to be permitted to review grand jury materials (without disclosure) in preparing and litigating a related civil case is one that demands a general answer, provided by this Court.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AUTHORIZING THE DISCLOSURE OF GRAND JURY MATERIALS FOR THE LIMITED PURPOSE OF ENSURING CONSISTENT ENFORCEMENT OF FEDERAL LAW

The court of appeals held that the district court's Rule 6(e) order, which permitted the Antitrust Division to disclose grand jury materials to specified attorneys in the Civil Division and United States Attorney's office for limited consultative purposes, should be vacated because the Antitrust Division had not shown a sufficient "particularized need." The court of appeals accepted the Antitrust Division's need to consult and to provide detailed information in order to do so (Pet. App. 9a), but it ruled that the Antitrust Division did not "need" to use grand jury materials, because it has broad precomplaint discovery powers under the ACPA, 15 U.S.C. 1311-1314. The court acknowledged that "a substantial amount of additional government time and effort may be required" (Pet. App. 10a) for this duplicative discovery, but it ruled that, under *Sells*, "such a factor can play no part in our analysis" (*ibid.*). In sum, the court ruled that whenever the government *can* duplicate grand jury materials through civil discovery or some other means, it may not obtain a Rule 6(e) order. The court thus denied continued use of grand jury materials in precisely those cases where there is no reason whatever to do so.

The district court properly exercised its "substantial discretion" (*Douglas Oil*, 441 U.S. at 223) in granting the Antitrust Division's Rule 6(e) motion.[33]

[33] Rule 6(e)(3)(C)(i) authorizes disclosure of grand jury material "preliminarily to or in connection with a judicial proceeding" upon a showing of particularized need. See

It permitted the Antitrust Division to make disclosure solely for the purpose of obtaining the advice of the Civil Division and the United States Attorney in order to ensure consistent government enforcement of the False Claims Act. Ensuring consistency in the enforcement of federal law is surely a legitimate purpose, as well as a "relevant consideration[], peculiar to [the] Government * * * that weigh[s] for * * * disclosure" (*Sells*, 463 U.S. at 445). See *Abbott*, 460 U.S. at 567-568 n.15. The court of appeals did not question the government's showing that the Civil Division could not offer the Antitrust Division meaningful advice without first examining some of the grand jury materials.[34] Accordingly, disclosure for this limited purpose clearly served "the ends of justice" (*Socony-Vacuum Oil Co.*, 310 U.S. at 234).

The limited disclosure allowed by the district court's Rule 6(e) order also posed no material threat to any of the interests that Rule 6(e) is meant to protect. The grand jury proceedings had been terminated, and the interests relevant to the protection of an ongoing investigation, the court of appeals recognized, were therefore irrelevant (Pet. App. 7a). The court also recognized that limited purpose disclosure to the attorneys in the Civil Division and the United States

Abbott, 460 U.S. at 567 n.14 (disclosure appropriate where it is necessary to avoid a possible injustice in another judicial proceeding, need for disclosure outweighs the need for continued secrecy, and request is structured to cover only material needed); *Douglas Oil*, 441 U.S. at 222 (same).

[34] As explained above (pages 5-6), the Antitrust Division sought the authority to disclose grand jury materials to the Civil Division only after its discussions with the Civil Division not involving the use of grand jury materials had proved fruitless. See Pet. App. 3a.

Attorney's Office posed relatively little "risk of further leakage or improper use" of the materials (*ibid.* (quoting *Sells*, 463 U.S. at 445)). In particular, providing Civil Division attorneys with grand jury materials under a Rule 6(e) order involves no greater risk of subsequent inadvertent or illegal disclosure than providing the same attorneys with the same materials obtained under the ACPA. Indeed, while the attorneys who receive such materials are required to keep them confidential in either case (compare Rule 6(e)(2) with 15 U.S.C. 1313(c)(4)), there may well be less risk of inadvertent or illegal disclosure of grand jury information than of information gathered under the ACPA, since violation of a Rule 6(e) order would be punishable as contempt of court. And the court of appeals agreed that the disclosure would save the government the substantial time and expense it would incur if it had to recreate the materials, particularly the grand jury testimony, through the ACPA (Pet. App. 8a). For all these reasons, the Antitrust Division clearly demonstrated that "the need for disclosure [was] greater than the need for continued secrecy" (*Douglas Oil*, 441 U.S. at 222).

The court of appeals ruled, however, that in view of the Antitrust Division's civil discovery powers it did not "need" to disclose the grand jury materials. Pet. App. 9a-10a. It recognized the "substantial amount of additional government time and effort" involved in duplicating the materials, but ruled that "such a factor can play no part" in a district court's decision whether to authorize the disclosure of grand jury materials (Pet. App. 10a, citing *Sells*, 463 U.S. at 431). That conclusion, however, seriously misreads this Court's decision in *Sells*.

In *Sells*, the Court rejected a construction of Rule 6(e) that would have permitted the disclosure of grand jury materials without a Rule 6(e) order to any Department of Justice attorney for use in preparing a civil suit. The Court said that "saving time and expense" did not justify dispensing with the requirement of a Rule 6(e) order. 463 U.S. at 431. But nowhere in *Sells* did the Court suggest that the saving of time and expense "can play no part" (Pet. App. 10a) in a district court's analysis of whether a Rule 6(e) order is appropriate in a particular case. On the contrary, *Sells* expressly endorsed the disclosure standard previously adopted in *Douglas Oil* (463 U.S. at 443-444), which *Sells* described as "a highly flexible [standard], adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others" (*id.* at 445). See *Douglas Oil*, 441 U.S. at 223. Neither *Sells* nor *Douglas Oil* requires the government to waste its resources in duplicative discovery when the purpose of disclosure is manifestly legitimate, there is no risk to secrecy, and there is no other reason for compelling such duplication of effort.[35]

There is no sound reason for a per se rule that whenever the Department of Justice *can* duplicate grand jury materials through civil discovery it *must* do so, or forgo their use. Such a rule would frequently, as in this case, hamper the government's

[35] The Court in *Sells* did suggest that district courts may "take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure" (463 U.S. at 445). But the inclusion of this point in a list of possible considerations hardly suggests a per se rule that what can be duplicated must be duplicated.

efforts to enforce federal law in a consistent manner: if the Antitrust Division must recreate grand jury materials under the ACPA whenever it can do so, resources that should be spent elsewhere will be needlessly diverted, and in many cases, resource and time constraints will simply prevent effective civil enforcement of the law.[36] That result would serve no valid purpose, because it is in those situations where civil discovery is capable of fully duplicating the work of the grand jury that the reasons for nondisclosure are least compelling. It makes no sense to require the government to follow a roundabout method of obtaining the same information it could obtain directly under Rule 6(e). The *only* effect of denying the Antitrust Division a Rule 6(e) order in a case like the present is to burden the government with needless delay and expense or to foreclose legiti-

[36] The Civil Division, though expert in the False Claims Act, lacks the resources to investigate and prosecute all possible cases of fraud against the government and therefore must rely on other Divisions and Offices—suitably advised—for enforcement. It is particularly important, moreover, that the Antitrust Division be able to consult with the Civil Division regarding its enforcement practice under the False Claims Act, because the Antitrust Division intends to enforce that statute vigorously in cases where the federal government suffers a monetary loss as a result of an antitrust violation. See D. Ginsburg, *Antitrust Enforcement in the Second Term* 2-3 (Nov. 8, 1985) (unpublished manuscript 19th New England Antitrust Conference). At the same time, there is no reason to suppose that fostering such consultation will always result in the filing of additional False Claims Act suits. Indeed, it may often be in a private party's interest for the Civil Division to be able to offer its advice, precisely because the Civil Division is also in the best position to recommend when, for policy reasons, a False Claims Act claim should *not* be filed.

mate consultation and, in some cases, civil enforcement.

The court of appeals stated that its decision to vacate the Rule 6(e) order was "influenced" by the fact that the government's motion and the district court's order failed to specify the materials that would be disclosed (Pet. App. 10a-11a). That concern was misplaced. In the first place, the court of appeals failed to take account of the inherently limiting effect of the district court's requirement that any disclosure of grand jury materials be made solely for the consultative purposes specified in the government's request.[37] Since *nothing* could be disclosed to the Civil Division and the United States Attorney's Office for their *own* use, or could be used by the recipients for any purpose other than providing their advice to the Antitrust Division, there simply was no incentive to disclose more than the minimum necessary for that advice to be given.[38]

[37] The Antitrust Division's motion made clear that the materials sought to be disclosed would not be used by the Civil Division or the United States Attorney's Office for a "further investigation" (J.A. 13). The district court also specifically stated in its order that the Civil Division was required to treat "this information * * * as confidential" and to limit "its use * * * solely to the purposes" for which disclosure was requested and authorized (Pet. App. 23a). There is no claim that the Civil Division attorneys used this material for anything other than the limited consultative purpose authorized by the district court's order.

[38] The Antitrust Division's motion sought the authority to disclose only such internal memoranda and transcripts or exhibits as would set forth the Antitrust Division's view of the evidence and enable the Civil Division to give meaningful guidance on the application of the False Claims Act to the conduct at issue. That material, the court of appeals seemed

The court of appeals also overlooked the fact that the reason for the disclosure made impossible a complete advance specification of the items to be disclosed. The Antitrust Division sought to obtain the informed opinion of the Civil Division and the United States Attorney's office as to whether a False Claims Act suit would be consistent with federal enforcement policy. Neither the Antitrust Division nor the district court was in a position to decide, in advance, precisely what information would need to be disclosed for this purpose; that would necessarily be determined, in part, in the consultative process itself. Of course, the district court could have required the Antitrust Division to come repeatedly to court to identify each document or transcript that had to be disclosed; but that formality would have served little purpose except to increase the burden on the court and provide opportunities for delay. Accordingly, in light of the legitimate and limited purpose of this disclosure request, the scope of the district court's order was altogether appropriate.

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to acknowledge (Pet. App. 11a), would involve only a small portion of the grand jury materials. Indeed, out of a grand jury record consisting of approximately 250,000 pages of subpoenaed documents and testimony by dozens of witnesses (*id.* at 12a), the Antitrust Division actually disclosed to the Civil Division approximately 350 pages of memoranda and approximately 100 pages of documents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
RICHARD K. WILLARD
Assistant Attorneys General

LOUIS R. COHEN
Deputy Solicitor General

W. STEPHEN CANNON
Deputy Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

ROBERT B. NICHOLSON
STEVE MAC ISAAC
DOUGLAS N. LETTER
ANNA SWERDEL
CAROLYN G. MARK
Attorneys

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Petitioner,

[redacted]

Respondents.

[redacted]

BRIEF FOR RESPONDENTS

*PAUL S. GRAND
DIANA PARKER
GRAND & OSTROW
641 Lexington Avenue
New York, New York 10022
(212) 207-3631

Counsel for John Does I and II and John Doe, Inc. I

*Counsel of Record

Parties to the Proceeding

Respondents are five individuals who were witnesses before the grand jury and three corporations whose documents were subpoenaed by the grand jury.*

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* The stock of each of the three corporations as well as the stock of the parent of the only corporation that has a parent or a subsidiary is privately held.

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TABLE OF AUTHORITIES

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1613

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOHN DOES I, II, III, IV, V and JOHN DOES, INC., I, II and III,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Statement of the Case

In November 1981, the Agency for International Development notified the Department of Justice that sales of tallow to a foreign country "might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq*." (Gov't Br. at 3). In March 1982, the Antitrust Division commenced a grand jury investigation; no civil investigation was begun. (J.A. at 17). The theory of the grand jury investigation was that Sherman Act jurisdiction existed for sales of drummed tallow, even though that commodity is not sold within the United States, because foreign countries sometimes use some funds appropriated for their use by Congress to pay for the commodity. (J.A. at 43).

By April 1982, many thousands of documents, including voluminous documents from John Does, Inc. I, II and III, had been subpoenaed by the grand jury. Thereafter numerous witnesses, including John Does I, II, III, IV and V, testified before the grand jury. (J.A. at 43). Although the attorneys for John Does repeatedly raised with the Antitrust Division whether the acts in issue were within the subject matter jurisdiction of the Sherman Act and questioned the merits of the case, the grand jury investigation continued until the eve of its expiration date, June 8, 1984. At that time the Antitrust Division informed respondents that the grand jury would not be asked to return any indictments. (J.A. at 43-44).

Nonetheless, the Antitrust Division apparently decided to test its novel theories of jurisdiction in a civil suit. On June 28, 1984, the attorney who had been in charge of the grand jury investigation mailed Civil Investigative Demands ("CIDs") to John Does, Inc. I, II and III. The CIDs were essentially copies of earlier grand jury subpoenas and were accompanied by a letter advising each recipient that the CID could be complied with by certifying that all documents sought had been produced to the grand jury. In response, John Does, Inc. I and II declined to execute such a certificate and advised the Antitrust Division that in the absence of a court order the use of grand jury materials, including documents produced in response to grand jury subpoenas and grand jury testimony and leads therefrom, to prepare a civil suit would violate Rule 6(e) of the Federal Rules of Criminal Procedure. John Doe, Inc. III executed the certificate specifically preserving its rights under Rule 6(e). (J.A. at 44).

No documents were produced in response to the CIDs and the Antitrust Division made no attempt to enforce the CIDs, nor did the Antitrust Division take depositions pursuant to the Antitrust Civil Process Act. Instead, the Antitrust Division simply made a unilateral decision, without authorization from the court, that it was entitled to the wholesale use of grand jury materials, including testimony of dozens of witnesses and thousands of subpoenaed documents, to initiate and litigate a

civil lawsuit, and refused to return any subpoenaed documents to their owners, even though the grand jury had expired. (J.A. at 44).

Proceedings Below

The Antitrust Division did not seek in this case a disclosure order pursuant to Rule 6(e), Fed.R.Crim.P., for the use of grand jury materials by the prosecutors who had conducted the grand jury proceedings to prepare and litigate the related civil case. Instead, on March 6, 1985, the Antitrust Division informed respondents that on November 30, 1984, it had obtained, without notice, an *ex parte* order authorizing disclosure of grand jury material to the Civil Division for the purpose of consultations between the two divisions. This order was obtained three months after the Antitrust Division first consulted with the Civil Division. (J.A. at 44). The order authorized wholesale disclosure of grand jury material to the Civil Division, even though no showing of particularized need was made. To obtain the order, the Antitrust Division had merely stated that the purpose of the disclosure was to consult with the Civil Division to ensure uniformity of litigation under the false claims acts, while conceding to the District Court that "[w]ith [broad] civil investigative powers available to the Antitrust Division, there is no reason for it to use a grand jury to gather evidence for a civil case." (J.A. at 15).

On March 12, 1985, the District Court unsealed the *ex parte* order, and the Antitrust Division informed respondents that, on March 15, 1985, it would file a civil complaint alleging violations of the Sherman Act and federal false claims acts. (J.A. at 44-45). Respondents immediately moved on March 12, 1986 in the District Court for vacatur of the *ex parte* order and for protective relief prohibiting the Government from using grand jury materials to prepare or litigate the civil case. Although the Antitrust Division conceded to the District Court that at least 90 percent of the material on which the civil case is based was grand jury material (J.A. at 45), the District Court denied all relief requested. (Pet. App. at 21a). On March 15,

1985, the Court of Appeals for the Second Circuit ordered the sealing of the complaint expected to be filed by the Antitrust Division on that date and further ordered that "[n]o party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not now privy to such information." (Pet. App. at 20a). This prohibition remains in effect.

On September 24, 1985, the Second Circuit reversed the *ex parte* Rule 6(e) order and granted the motion to enjoin the Antitrust Division from any further access to or use of the grand jury materials to litigate the civil action. Even though the complaint disclosed matters occurring before the grand jury, the Second Circuit declined to dismiss the complaint. Without finding particularized need for this disclosure, the Court simply stated that it would not dismiss the complaint because the statute of limitations on at least one of the Government's claims had run after the filing of the complaint and the complaint did not specifically quote from or name as its source grand jury materials. (Pet. App. at 17a).

Summary of Argument

I. In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court held that, under Rule 6(e), Fed.R.Crim.P., attorneys in the Civil Division of the Justice Department can obtain access to grand jury materials for use in a civil case only pursuant to a court order upon a showing of particularized need. The *Sells* court, however, reserved the question of whether Rule 6(e) authorized the automatic "continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15. This case presents that issue and demonstrates that no such authority exists.

The Government contends that the plain language of Rule 6(e) explicitly grants to the prosecutor who conducted a grand

jury proceeding civil litigation powers to which no other civil litigant is entitled. The Government further submits that the use of grand jury materials to litigate a civil case, including use in the civil complaint of facts derived from grand jury materials, does not disclose grand jury materials when those materials are used by the prosecutor who participated in the grand jury investigation. Finally, the Government argues that the Antitrust Division merits a special exemption from Rule 6(e)'s limitations on the civil use of grand jury materials because an Antitrust Division prosecutor has no *need* to use grand jury materials to litigate a civil case, while permitting such use would save time and money. These arguments ignore (1) the plain language of the Rule, (2) the function of the grand jury, (3) the purposes of grand jury secrecy, (4) the legislative history of the Rule, (5) the holdings of this Court, (6) the facts of this case, (7) the realities of civil litigation, (8) the temptations to abuse the grand jury presented by automatic access to grand jury materials for use in civil cases, and (9) the obvious alternative to expending duplicative time and expense available by virtue of the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§ 1311-14.

Nothing in Rule 6(e) grants a prosecutor who conducted the grand jury proceeding the power to obtain the kinds of information to which a grand jury is entitled and to which no civil litigant is entitled. Only the grand jury has been given the extraordinary powers to obtain such information. The plain language of the Rule limits these powers to the function of the grand jury to investigate criminal cases. Because these powers are essential to that function, and because secrecy is indispensable to the exercise of those powers, this Court has consistently limited the disclosure of grand jury information. The legislative history of the Rule supports this plain construction, and to create an exception for the prosecutor who conducted the grand jury proceeding would nullify prior decisions of this Court.

II. In this case the prosecutor who conducted the grand jury proceedings would not merely be using grand jury materials for some hypothetical internal "planning" purpose, as the Government pretends. The complaint itself would disclose matters occurring before the grand jury because, as the Government concedes, it is based almost exclusively on grand jury materials. The ensuing litigation would result in substantial further disclosure of grand jury materials because defendants would be entitled to obtain the factual basis of the allegations in the complaint in order to defend themselves.

III. Finally, to permit the prosecutor who conducted the grand jury proceeding to use those materials to litigate a civil case would create temptations to misuse the grand jury to obtain additional information useful only in a civil case and would increase the risk of improper disclosures of grand jury materials. These risks are unwarranted given the Antitrust Division's option of obviating duplicative discovery and disqualification by using its concededly broad pre-complaint discovery powers under the ACPA to investigate cases when, as here, it is uncertain whether criminal charges will ever be initiated.

IV. Given the Antitrust Division's broad powers under the ACPA, it concededly had no need to base its civil case on grand jury materials. Consequently, in seeking the *ex parte* District Court order authorizing disclosure of grand jury materials to the Civil Division in order to bring this civil case, the Antitrust Division wholly failed to demonstrate particularized need, and the order improperly authorized the blanket disclosure of the entire grand jury proceedings. Violation of these two principles of grand jury secrecy, consistently upheld by this Court, required reversal. In addition, respondents were entitled to notice and an opportunity to be heard because nothing was disclosed at the *ex parte* proceeding not already known to respondents and possession of respondents' property was at issue.

Argument

POINT I

A PROSECUTOR'S RIGHT TO USE GRAND JURY MATERIALS WITHOUT A COURT ORDER IS LIMITED TO HIS DUTY TO ENFORCE THE CRIMINAL LAW

A. The Plain Language and Legislative History of Rule 6(e) Demonstrate That the Rule Limits a Prosecutor's Right to Use Grand Jury Materials

Rule 6 of the Federal Rules of Criminal Procedure codifies the conduct of grand jury investigations of criminal cases and prohibits disclosure of those investigations except as provided by that Rule. The provisions of the Rule recognize that the grand jury's performance of its function requires the assistance of prosecutors and other government personnel. The Government attempts to parlay this limited role into an automatic right to continued access to those materials for other purposes even after the grand jury has expired without returning an indictment. This affirmative grant of power to the prosecutor who conducted the grand jury proceeding is supposedly found in the plain language of the Rule.

Not a single word of the plain language of Rule 6(e) grants to prosecutors the extraordinary powers claimed by the Government. To read the Rule as the Government suggests would be to confer on the prosecutor who conducted the grand jury proceeding powers to which no other civil litigant is entitled.

No other civil plaintiff has access to the totality of the thousands of pages of testimony and documents which constitute the grand jury's proceedings. *See Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). No other civil plaintiff is entitled to automatic access to the bank records of an adversary without giving notice and an opportunity to be

heard.[1] No other civil plaintiff is entitled to automatic access to a witness's or an adversary's tax returns in a non-tax case.[2] No other civil plaintiff is entitled to subpoena the testimony of a witness's or of an adversary's counsel as to who pays his fees.[3]

No other civil plaintiff has the right to exclude a witness's counsel during the questioning of that witness so that the witness may be "questioned vigorously, maybe even browbeaten." *Illinois* v. *F.E. Moran, Inc.*, 740 F.2d 533, 540 (7th Cir. 1984). No other civil plaintiff is able to question a witness knowing his prior testimony to which that witness has no access.[4] Moreover, no other civil plaintiff has the power to use that prior secret testimony as a predicate to institute or threaten perjury charges against an adversary.

A grand jury consisting of 23 citizens is entrusted with this information and these extraordinary powers. Nothing in Rule 6(e) grants *prosecutors* such powers.

The prosecutor who conducted the grand jury proceedings does not own the records of the grand jury. As this Court held in *Sells*, a Justice Department attorney is not free to rummage through the records of a grand jury "simply by right of office." 463 U.S. at 428. "[G]rand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators. . . . Instead those documents are records of the court." *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 684-85 (1958) (Whittaker, J., concurring). *See In re Illinois Petition*, 659 F.2d 800, 803 (7th Cir. 1981), *aff'd*, *Illinois* v.

1 *Cf.* Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* (right to notice when bank records are subpoenaed except where Government makes showing of possible criminal conduct pursuant to § 3409).

2 *Cf.* Internal Revenue Code, 26 U.S.C. § 6103 (confidentiality of tax return information).

3 *Cf. In re Grand Jury Subpoena*, 781 F.2d 238 (2d Cir.) (*en banc*), *cert. denied*, 106 S.Ct. 1515 (1986) (grand jury may subpoena attorney to testify as to payment of his fee).

4 *Cf.* ACPA, 15 U.S.C. § 1312 (witness has a right to counsel and a right to a transcript of his testimony under the ACPA).

Abbott & Associates, Inc., 460 U.S. 557 (1983); *In re Grand Jury Investigation of Cuisinarts Inc.*, 665 F.2d 24, 31 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068 (1983). Likewise, subpoenaed documents are the records of their owners. *In re Special March 1981 Grand Jury*, 753 F.2d 575, 579-80 (7th Cir. 1985).

Not only is the Rule devoid of any affirmative grant of such powers to a prosecutor, the Rule plainly limits the prosecutor's right to use grand jury materials to his duty to enforce the criminal law. Disclosure without a court order of grand jury materials to the prosecutor conducting the grand jury proceeding is permitted only under Rule 6(e)(3)(A)(i), and disclosure under (A)(i) is permitted only "in the performance of such attorney's duty."[5]

In *Sells*, this Court analyzed whether this reference to "duty" was an implicit limitation to criminal matters, just as (A)(ii) is an explicit limitation to "duty to enforce federal criminal law." The Court concluded that "when Congress included the criminal-use limitation in the new (A)(ii), it was merely making explicit what it believed to be already implicit in the existing (A)(i) language." 463 U.S. at 435-36. This conclusion resolves the issue of whether (A)(i) grants the prosecutor who conducted the grand jury proceeding an automatic right to use grand jury materials in civil cases. It does not; prosecutors only have such a right with respect to enforcement of the criminal law.

The reason for this limitation was succinctly expressed in *Sells*:

> if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of

5 The Government's reliance on the penultimate sentence of Rule 6(e)(2) is misplaced. That sentence—"No obligation of secrecy may be imposed on any person except in accordance with this rule"—is not an expansion of prosecutorial power, as the Government claims. It is instead a protection of witnesses *from* prosecutors who improperly tell witnesses that they cannot discuss their testimony, even with their own lawyers. *See* Advisory Committee Notes on Federal Rule of Criminal Procedure 6(e), 18 U.S.C. App. at 269; *United States* v. *Kilpatrick*, 594 F.Supp. 1324, 1335-36 (D.Colo. 1984).

> their task, the use of those powers ought to be limited as far as reasonably possible to the accomplishment of the task.

463 U.S. at 434-35.

The Court's review in *Sells* of the legislative history of the 1977 amendment also compelled the obvious conclusion that the prosecutor who conducts the grand jury proceeding has an automatic right of access to grand jury materials *only* when he is acting under the authority of the grand jury. As this Court pointed out, Acting Deputy Attorney General Richard Thornburgh, testifying on behalf of the Justice Department at the House Hearings, addressed the problem of use of grand jury materials for non-grand jury purposes:

> 'Now, when you begin to move beyond the parameters of that particular [criminal] investigation, we get to the point that you and I both have some trouble with. The cleanest example I can think of where a 6(e) order [i.e., a court order under what is now (C)(i)] is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued.
>
> '*It would be the practice of the Department at that time to seek a 6(e) order from the court in order that that evidence could be made available for whatever civil consequences might ensue.*'

463 U.S. at 439 (emphasis in original), *quoting* H.R. Rep. No. 95-195, 95th Cong., 1st Sess. at 4 (1977).

This Court then concluded that:

> The rest of the legislative history is consistent with this view that *no* disclosure of grand jury materials for civil use should be permitted without a court order. Congress' expressions of concern about civil use of grand jury materials did not distinguish in principle between such use by outside agencies and by the Department; rather, the key distinction was between disclosure for criminal use,

> as to which access should be automatic, and for civil use, as to which a court order should be required.

Id. at 440 (emphasis in original). This legislative history demonstrates that the plain language of the Rule and the function of the grand jury limit a prosecutor's right of access to grand jury materials to his duty to enforce the criminal law.

B. The Expansion of the Automatic Use of Grand Jury Materials to Prosecutors to Litigate Civil Cases Would Nullify Prior Decisions of This Court Upholding Grand Jury Secrecy

If the same prosecutor who conducted the grand jury proceeding were permitted to use grand jury materials to litigate a civil case without obtaining a Rule 6(e) order, the principle of grand jury secrecy prohibiting blanket disclosure of grand jury materials uniformly upheld by this Court from *Douglas Oil* to *Abbott* could be nullified. First, the prosecutor might be tempted to include the substance of the full scope of the grand jury proceedings in such a complaint, in violation of this principle. (For a case that demonstrates such a use of grand jury material, *see In re Aswad* v. *Hynes*, 80 A.D.2d 382, 439 N.Y.S.2d 737 (3d Dep't 1981) (grand jury testimony included verbatim in pleadings filed by prosecutor litigating civil lawsuit)). Second, even if the disclosure of grand jury materials in the complaint were less than wholesale, that disclosure, together with the discovery to which the defendants would be entitled, could ultimately result in the disclosure of the full grand jury investigation. *See* Point II B *infra*.

The holding in *Sells*, that the Civil Division must obtain a Rule 6(e) order to use grand jury materials to litigate civil cases, could also be circumvented if the prosecutor who conducted the grand jury proceeding were permitted to use grand jury materials to litigate a civil case. A prosecutor who conducted the grand jury proceeding permitted to use those materials to write a civil complaint could and would, as occurred here, necessarily base the complaint on grand jury

information. When a complaint included enough grand jury information, the Civil Division could litigate the case based on information from the grand jury included in the complaint without obtaining a Rule 6(e) order, in violation of *Sells*.

This Court's decisions in *Douglas, Abbott and Sells* uniformly enforced grand jury secrecy because it is secrecy that is the most essential, even indispensable, characteristic of grand jury proceedings. *See Sells*, 463 U.S. at 424; *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d at 28. If grand jury secrecy is to be preserved in order to protect the essential functions of the grand jury, the same standards must be applied to the prosecutor who conducted the grand jury proceeding as are applied to all other civil litigants. *See In re District Attorney of Suffolk County*, 58 N.Y.2d 436, 461 N.Y.S.2d 773, 448 N.E.2d 440 (1983). In *Suffolk County*, a case less compelling than this one, the grand juries had long since expired, one of the targets had been convicted after a trial at which much of the grand jury material had been used to impeach witnesses, and the prosecutor who conducted the grand jury investigation had obtained a court order authorizing the use of the grand jury materials to prosecute a civil case. The highest court of the State of New York unanimously reversed the disclosure order, holding that the representation of the county in a civil case by the prosecutor who conducted the grand jury proceeding "accorded him no greater rights than would accrue to any other attorneys. . . ." 461 N.Y.S.2d at 777.

If, on the other hand, grand jury testimony were "routinely available for use in governmental civil litigation" by the prosecutor who conducted the grand jury proceedings, witnesses would necessarily be less willing to testify and the grand jury would be unable to perform its function of investigating criminal offenses. *Sells*, 463 U.S. at 432. Especially when, as here, a grand jury has returned no indictment, this Court should strictly apply the principles of grand jury secrecy embodied in its prior opinions.

POINT II

THE USE OF GRAND JURY MATERIALS TO LITIGATE THE CIVIL CASE WOULD DISCLOSE MATTERS OCCURRING BEFORE THE GRAND JURY

A. The Complaint Itself in This Case Would Disclose Grand Jury Materials

The Government acknowledged in its brief to the Second Circuit that "factual allegations [of the complaint], of course, are based in large part on information uncovered during the grand jury investigation, including subpoenaed documents and grand jury testimony." (Gov't Br. to Second Circuit at 44). In the face of this concession, the Government seems to argue for the first time that no disclosure of matters occurring before the grand jury takes place unless actual, physical grand jury transcripts or subpoenaed documents are disclosed. This position ignores the Government's own previous definition of matters occurring before the grand jury as well as the plain language of the Rule and every decision interpreting the Rule.

As the Second Circuit recognized in ordering the complaint in this case to be sealed, the complaint does disclose grand jury materials, and Rule 6(e) prohibits such disclosure of "matters occurring before the grand jury." "Matters occurring before the grand jury" ". . . encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal . . . the substance of testimony. . . ." *Fund for Constitutional Government* v. *National Archives & Records Service*, 656 F.2d 856, 869 (D.C. Cir. 1981). The Antitrust Division cited in its brief this very definition of grand jury materials when it was the party objecting to disclosure of its fact memoranda to counsel for respondents. (Gov't Br. to Second Circuit at 45). If the disclosure of fact memoranda that summarize grand jury materials "would seriously have compromised grand jury secrecy" (Gov't Br. to Second Circuit at 26), a complaint that summarizes grand jury materials is equally a breach of grand jury secrecy.

Even an internal fact memorandum to the file is no less grand jury material than is an actual transcript of testimony. *In re Special February 1975 Grand Jury*, 662 F.2d 1232, 1238 (7th Cir. 1981), *aff'd*, *United States* v. *Baggot*, 463 U.S. 476 (1983). Similarly a summary of all or part of a case, even if prepared after the conclusion of the grand jury proceedings, is not "sufficiently divorced from the grand jury not to be subject to Rule 6(e)." *Id.* Indeed, the United States conceded in *Baggot* that summaries of testimony are governed by Rule 6(e). *Id.*

This recognition of the meaning of grand jury materials is critical because, in many instances, it is the substance of grand jury testimony that is impermissibly sought in order to save time and expense; actual verbatim transcripts are not necessarily sought. In *Baggot*, an interview summary, not testimony, was sought, and when a prosecutor leaks information to the press, it is a summary of the status of the grand jury investigation that is disclosed. Nevertheless, matters occurring before the grand jury have been improperly disclosed, regardless of whether testimony is specifically quoted. *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980).

The Government also seems to argue for the first time that so long as the grand jury is not specifically identified as the source of a prosecutor's information, a prosecutor may disclose information learned from grand jury proceedings without disclosing "matters occurring before the grand jury." This strained, narrow reading of Rule 6(e) ignores the purpose of the Rule and the purposes of grand jury secrecy. Such disclosures do all the affirmative damage identified by this Court: (1) prospective witnesses would be discouraged from voluntarily testifying, knowing that those against whom they testify would be aware of that testimony; (2) witnesses would be less likely to testify fully and frankly as they would be open to retribution as well as to inducements; (3) there would be a risk that those about to be indicted would flee or would try to influence individual grand jurors; and (4) those accused but exonerated would be held up to public ridicule. *See Douglas Oil*, 441 U.S. at 219.

B. The Litigation of a Civil Case Based on Grand Jury Materials Would Necessarily Result in Disclosure

The Government also ignores the effect of basing a civil complaint on grand jury materials in asserting that the issue here is whether a prosecutor who conducted the grand jury proceeding may make continued use of grand jury materials to litigate the civil case without obtaining a Rule 6(e) order, "so long as he does not disclose the materials to any other person." (*See* Gov't Br. at 13, 14, 18, 19, 20, 23). The Government pretends that no disclosure will occur because grand jury materials would be used simply for internal "planning." Ignoring the realities of civil litigation, the Government then insists that no disclosure will occur because the materials will be "reexamined" not "exposed to view" and "the act of viewing" will occur but not "exposing materials to view."[6] (Gov't Br. at 14, 24-25).

In this case the Government conceded to the District Court that "at least 90 percent of the material on which the civil case will be based is grand jury material." (J.A. at 45). Adversarial litigation of this complaint would necessarily result in substantial disclosure of grand jury material.

For example, as in any antitrust case, respondents would serve interrogatories asking for the factual basis of specific allegations in the complaint. Such interrogatories are basic and critical in antitrust litigation and respondents would be entitled to answers, even though those answers would necessarily reveal

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6 The Government admits that it engages in these semantic gymnastics and relies on Webster's for the meaning and purpose of Rule 6(e) out of its need to distinguish a prosecutor from a witness. According to the Government, grand jury material is not "disclosed" to a prosecutor because he knows the contents of the material, but grand jury material would be "disclosed" to a witness by the transcript of his testimony *even though* he knows its contents. (Gov't Br. at 26 n.20). The Government has wholly failed to explain the difference it is attempting to create.

grand jury information.[7] Simply put, under the discovery rules of the Federal Rules of Civil Procedure as interpreted by this Court, litigants in complex cases, such as the antitrust case here, must be adequately informed of the accusations against them in order to defend such cases. *See, e.g., Herbert* v. *Lando*, 441 U.S. 153, 177 (1979). To bar such discovery would be to create a class of cases to which the discovery rules would not apply and thereby revive the dark days of trial by ambush that the Federal Rules were specifically devised to bring to an end. No decision of this Court supports such a total abrogation of the discovery rules of the Federal Rules of Civil Procedure.[8]

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7 Respondents herein would have compelling and particularized need for these answers. Unlike the defendants in *Procter & Gamble*, 356 U.S. at 678, who requested blanket disclosure of the entire grand jury proceedings under Rule 34, Fed.R.Civ.P., respondents herein would request specific information as to the basis of certain allegations in the complaint pursuant to Rule 33, Fed.R.Civ.P., and the answers to those interrogatories would be necessary to defend the civil case. Since the sole basis for the allegations in the complaint is the evidence presented to the grand jury, such evidence would be disclosed.

8 The Second Circuit was correct in noting that only the Government would have total and "exclusive access to a storehouse of relevant fact," when the Government *initiates* civil antitrust actions based on grand jury materials or on material obtained by the Government under the ACPA. 774 F.2d at 41 (Pet. App. at 15a). However, the Second Circuit was incorrect if it was assuming that the discovery rules of the Federal Rules of Civil Procedure have no application after initiation of those cases. The interrelationship of the confidentiality provisions of the ACPA and the discovery rules was thoroughly considered in *United States* v. *American Telephone & Telegraph Co.*, 86 F.R.D. 603, 647-48 (D.D.C. 1980). The Court reasoned that prohibiting discovery of material obtained by the Government under the ACPA would be contrary to the Federal Rules and manifestly unfair:

> Although literally sustainable, this construction of the statute seems manifestly unfair when considered according to modern principles of civil procedure. Particularly would it be unfair in a proceeding such as this, where elaborate pretrial discovery and issue-formulation procedures have been designed to get all the thousands of cards on the table in advance of trial itself.
>
> * * *
>
> The statute plainly contemplates that CID investigations may be followed by Government civil antitrust suits, which of course, are governed by the Federal Rules of Civil Procedure.

(footnote continued)

Depositions would also create innumerable disclosure problems. Every question at a deposition asked by the prosecutor who conducted the grand jury proceeding would more likely than not be taken from grand jury materials. Yet, the Government acknowledges that it would not be able to obtain a Rule 6(e) order authorizing disclosure of all grand jury transcripts. With respect to each question, the court would have to rule whether it was based on grand jury materials before a witness's counsel could determine whether to permit the witness to answer such an apparently tainted question.

Finally, in this case if the complaint were unsealed, respondents would move under Rule 11, Fed.R.Civ.P., to strike certain specific allegations of the complaint which are not, we believe, supported by any evidence presented to the grand jury. If the prosecutor who conducted the grand jury proceeding in fact has any evidence to support those particular allegations, that grand jury material would be revealed.

This tension between Rule 6(e) and the Federal Rules of Civil Procedure which would be created by permitting the wholesale use of grand jury materials by a prosecutor to litigate a civil case should and could be simply avoided. Both the principles of secrecy underlying Rule 6(e) and the principles of mutuality and fairness underlying the discovery rules require the prohibi-

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> The Court concluded that the Federal Rules of Civil Procedure and the concepts of fairness and mutuality that underlie them required the termination of the government's exclusive access to the material if it is put to any more direct use than perusal. Just as a civil defendant is entitled to grand jury materials on a showing of particularized need, when the Government initiates an antitrust action based on material obtained under the ACPA, a defendant is entitled to obtain responses to appropriately specific discovery demands on a showing of use by the Government of those materials. The principles underlying the Federal Rules require such mutuality and fairness and prohibit one party from having total and " 'exclusive access to a storehouse of relevant fact.' " *Sells*, 463 U.S. at 434, *quoting Dennis* v. *United States*, 384 U.S. 855, 873 (1966).

tion of the wholesale use of grand jury materials to litigate civil cases.

C. Continued Access Is Disclosure

The Government is also incorrect as a matter of law in asserting that continued access by the prosecutor to grand jury materials after the grand jury has ended is not disclosure. As the Second Circuit recognized, this Court specifically held in *Sells* that continued access is disclosure under Rule 6(e). 774 F.2d 34, 40 (Pet. App. 12a-13a). In *Sells* this Court, adopting the language of the lower court, held that " '[e]ach day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the *continued access* of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing *further disclosure*.' " 463 U.S. at 422 n.6 (emphasis added).

When the clear language of Rule 6(e) and the Government's own position on the meaning of grand jury materials are applied to the facts of this case, it is indisputable that matters occurring before the grand jury would be disclosed if this Court unsealed the complaint, permitted the use of grand jury materials to litigate this civil case, or authorized continued access to grand jury materials after the grand jury has expired.

POINT III

ANTITRUST DIVISION PROSECUTORS DO NOT MERIT A SPECIAL EXEMPTION FROM RULE 6(e) TO LITIGATE CIVIL CASES

A. The Temptation to Abuse the Grand Jury Exists for Antitrust Division Prosecutors

The Government argues that Rule 6(e) should not be applied to an Antitrust Division prosecutor who conducted a grand jury investigation because that prosecutor does not *need* to use grand jury materials to litigate civil cases and therefore the temptation to abuse the grand jury that worried the *Sells* court does not exist in the context of the Antitrust Division's enforcement of the Sherman Act. (Gov't Br. at 35-37).

However, the temptation recognized by this Court in *Sells* improperly to use the grand jury, when it has not been preceded by an ACPA investigation, to obtain evidence for civil cases applies equally to an Antitrust Division prosecutor concerned with saving time and expense. If prosecutors are

> free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.

Sells, 463 U.S. at 432.

The importance of eliminating the temptation so to misuse a grand jury is particularly great since such misuse "if and when it does occur, . . . would often be very difficult to detect and prove." *Id.* Rather than delving into the "difficult" morass of litigating in each case whether the prosecutor who conducted the grand jury proceeding was "tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in a civil suit," *id.*, what is required is a

uniform rule that all litigants—regardless of their identity—obtain court orders before using grand jury materials in civil litigation. The need for such a uniform rule is particularly apparent where, as here, the prosecutor who conducted the grand jury proceedings never asked the grand jury to return any indictments. *See In re Sells* (II), 719 F.2d 985, 991 n.8 (9th Cir. 1983), *citing United States* v. *Pennsalt Chemicals Corp.*, 260 F.Supp. 171 (E.D.Pa. 1966)(greater likelihood of improper use of grand jury where grand jury does not return indictments).

Finally, as the Second Circuit held, the temptation to abuse the grand jury is also increased by the expansion of access to nonprosecutors as well as to prosecutors when grand jury materials are used to litigate civil cases. 774 F.2d at 41-42 (Pet. App. at 15a). Such expansion of use increases the risk of inadvertent and improper disclosures, and such disclosures are an abuse of the grand jury that threaten its continued effectiveness.

This Court has consistently limited use of grand jury materials in order to reduce the opportunities to abuse the grand jury. To reverse the course of those decisions here would rekindle those temptations.

B. The ACPA Obviates Any Problem of Duplicative Discovery or Disqualification

The Government complains that duplicative discovery and disqualification of Government attorneys will occur if the prosecutor who conducted the grand jury proceeding cannot use those materials to litigate a civil case when the grand jury has not returned an indictment.[9] Duplication need not occur. Since 1962 the Government has had the option of using its broad Civil Investigative Demand ("CID") powers under the

9 It is only in cases such as this one, where no indictment is returned, that any problem of duplication of effort by civil and criminal prosecutors might occur. When an indictment has been returned, a civil complaint can be based on the contents of the indictment, a public document; when a criminal trial occurs, civil litigants have access to the facts brought out during that trial.

ACPA to conduct civil investigations when the character of the conduct at issue is unknown, and *then* with that information to decide whether a criminal investigation is warranted.

As the Second Circuit pointed out, ACPA powers "are similar in many respects to a grand jury's powers," 774 F.2d at 39 (Pet. App. at 9a), and ACPA powers are sufficient to obtain the lesser proof required to establish civil liability. Just as with a grand jury investigation, discovery under the ACPA can be obtained prior to the initiation of legal action. Discovery under the ACPA is, as the Government itself acknowledges, less expensive than grand jury investigations. (Gov't Br. at 36). The ACPA also contains secrecy provisions which protect witnesses as well as the integrity of the investigation if no civil complaint is filed.

Changing the order of investigation would also facilitate the prosecution of civil cases because, pursuant to statute, the Antitrust Division can furnish the Civil Division with information gathered under the ACPA, while the Civil Division cannot obtain access to grand jury materials without a court order pursuant to Rule 6(e).[10] Moreover, the attorney who conducted the civil investigation could then conduct the grand jury investigation, if one were deemed necessary. Duplicative discovery and disqualification need not be issues.[11]

10 Indeed, the advice sought by the Antitrust Division from the Civil Division as to the false claims statutes here could readily have been obtained, had the Antitrust Division proceeded under the ACPA instead of in the grand jury. *See* Point IV *infra*.

11 The Government argues that affirmance of the Second Circuit in this case would necessitate restructuring the Justice Department. Even if this claim justified breaching grand jury secrecy, which it does not, the claim has paltry merit. Mechanisms are already in place that avoid unnecessary duplication in most complex cases—antitrust, securities and tax cases. Just as the ACPA can be used to avoid duplication in antitrust cases, the Securities and Exchange Commission minimizes duplication in securities cases by conducting the initial investigation civilly, and then referring cases to the Department of Justice for prosecution, if warranted. *See* Title 15 U.S.C. § 78u. In tax cases, neither the Department of Justice nor the Treasury Department has

(footnote continued)

Finally, because a grand jury investigation of criminal conduct carries with it much more serious repercussions and stigma than does a civil investigation, public policy supports following this order of proceeding while the character of the conduct at issue is being investigated. Indeed, the ACPA was enacted in part because "[r]esort to a grand jury . . . is a drastic method of investigation. . . ." H.R. Rep. No. 1386, *reprinted in* 1962 U.S. Code Cong. & Ad. News 2567, 2568. A grand jury investigation can "debase the law 'by tarring respectable citizens with the brush of crime when their deeds involve no criminality.' " *Abbott*, 460 U.S. at 571 n.26, *quoting* H.R. Rep. No. 1343, 94th Cong., 2d Sess. 3, 5 (1976). The issuance of grand jury subpoenas can alone destroy a business's credit, cause employees to quit and damage contractual relationships. Where, as here, jurisdiction as well as the merits of the case are questionable, prosecutors should not be encouraged to use a grand jury initially to investigate the character of the conduct.

POINT IV

THE *EX PARTE* ORDER PERMITTING DISCLOSURE OF GRAND JURY MATERIALS TO THE CIVIL DIVISION WAS NOT AUTHORIZED BY RULE 6(e)

A. There Was No Compelling and Particularized Need For Disclosure to the Civil Division

Because the Antitrust Division chose to use the grand jury in lieu of the ACPA to investigate this case, when the advice of the Civil Division was needed, Rule 6(e) required a showing of

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been crippled by this Court's ruling in *United States* v. *Baggot*, 463 U.S. 476 (1983), that the Internal Revenue Service must conduct its own civil investigations because grand jury material may not be routinely turned over to IRS for tax collection purposes.

The Government's concerns about the burden of affirmance of the Second Circuit's decision on small U.S. Attorney's offices is equally misplaced. Such offices are not ordinarily called on to staff long, complex cases; these are generally staffed from Washington and consist of the kinds of cases described above. Any duplication in the typical short case handled by such offices would accordingly be minimal.

particularized need for disclosure of grand jury materials to the Civil Division. However, as the Second Circuit recognized, the fact that the Antitrust Division had an arguably valid purpose in consulting with the Civil Division to ensure uniformity of enforcement of federal false claims statutes did not demonstrate particularized need. 774 F.2d at 38 (Pet. App. at 8a), *citing Abbott*, 460 U.S. 573 (the goals of antitrust law enforcement do not satisfy the requirement of particularized need). On appeal to the Second Circuit the Antitrust Division added the argument that disclosure was permissible to avoid duplicative discovery. However, as the Second Circuit recognized, this Court has held that the saving of time and expense—even in a law enforcement context—does not demonstrate particularized need. 774 F.2d at 39 (Pet. App. at 10a), *citing Sells*, 463 U.S. at 431. In every case, an arguably valid purpose can be stated for the use of grand jury materials, and the use of grand jury materials would always save time and expense for any civil litigant.

The Supreme Court recently reaffirmed in *Sells* that disclosure pursuant to Rule 6(e)(3)(c)(i) may be made only upon a strong showing of compelling and particularized need for disclosure:

> Parties seeking grand jury transcripts under Rule 6(e) must show [1] that the material they seek is needed to avoid a possible injustice in another judicial proceeding, [2] that the need for disclosure is greater than the need for continued secrecy, and [3] that their request is structured to cover only material so needed. . . .

463 U.S. at 443, *quoting Douglas Oil*, 441 U.S. at 222.

Since grand jury secrecy is an "indispensable" part of the federal constitutional system, *United States* v. *Johnson*, 319 U.S. 503, 513 (1943), the burden upon a party seeking to strip away its protections is a heavy one; conclusory allegations alone will not suffice. *See, e.g., Douglas Oil*, 441 U.S. 211; *In re Grand Jury Disclosure*, 550 F.Supp. 1171, 1183 (E.D. Va. 1982); *In re Grand Jury Proceedings*, 483 F.Supp. 422, 424 (E.D. Pa. 1979). Rather, what is first required is a showing that

"the usual channels of discovery have proved fruitless" and that they have been diligently pursued, through "prompt, thorough and exhaustive discovery." *Lucas* v. *Turner*, 725 F.2d 1095, 1109 (7th Cir. 1984).[12]

In this case, the Antitrust Division's *ex parte* petition to the District Court admitted that "[w]ith [the] civil investigative powers available to the Antitrust Division, there is no reason for it to use a grand jury to gather evidence for a civil case." (J.A. at 15). Yet, at the same time, the Antitrust Division conceded that no genuine independent efforts were made to obtain any information through the broad channels of discovery it had available to it. In light of these concessions the Second Circuit held that extra time and effort to obtain information through civil discovery do not constitute particularized need in this case. Here, the Antitrust Division wholly failed, indeed did not attempt, to demonstrate particularized need for disclosure of grand jury materials to the Civil Division.

12 Even prior to *Sells*, courts read Rule 6(e) to require that civil litigants make every effort to obtain information through discovery before attempting to obtain grand jury materials. *See, e.g., In re Grand Jury Matter (Catania)*, 682 F.2d 61, 66 (3d Cir. 1982) (disclosure of grand jury transcripts for impeachment purposes premature prior to state trial, and disclosure of full transcripts too broad for impeachment purposes); *In re Disclosure of Evidence*, 650 F.2d 599, 602, *as modified*, 662 F.2d 362 (5th Cir. 1981) (disclosure as aid to state criminal investigation and allegations of public interest not sufficient particularized need).

Since *Sells*, the courts have also so held. *United States* v. *Fischbach and Moore, Inc.*, 776 F.2d 839 (9th Cir. 1985) (mere recitation of finding of particularized need by District Court not sufficient); *Illinois* v. *F.E. Moran, Inc.*, 740 F.2d at 540 (no particularized need when witnesses have not yet been deposed and it is thus too early to tell if they need memories refreshed or impeached); *United States* v. *Liuzzo*, 739 F.2d 541, 545 (11th Cir. 1984) (findings of complexity of case and passage of time insufficient to establish particularized need).

B. The Blanket Disclosure of Grand Jury Materials Authorized by the District Court Was Not Permitted by Law

The Antitrust Division's *ex parte* application violated yet another, and perhaps more important, tenet of grand jury secrecy. A Rule 6(e) request must be structured with sufficient detail and particularity to enable the Court to order disclosure "discretely and limitedly." *Douglas Oil*, 441 U.S. at 221, *quoting Procter & Gamble*, 356 U.S. at 682.

The Antitrust Division requested disclosure of "a description and analysis of the evidence (both testimonial and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury." (J.A. at 12). No further specificity was supplied. Thus, as the Second Circuit held, the request was for disclosure of the full scope of the grand jury investigation. 774 F.2d at 39 (Pet. App. at 10a-11a). Indeed, the Government now admits that the four "fact memoranda" it disclosed to the Civil Division totalled approximately 350 pages in length. (Gov't Br. at 44 n. 38).

Such requests for blanket disclosure of the full scope of a grand jury investigation to unspecified numbers of people are improper. The Court was prevented from acting "discretely and limitedly" in response to this request, and blanket disclosure of grand jury material is not permitted by law. *Abbott*, 460 U.S. at 568.

C. An *Ex Parte* Proceeding Was Improper in This Case

As the Government acknowledges, courts have repeatedly held that *ex parte* proceedings in support of Rule 6(e) applications are inappropriate when the Government presents no information to the court which is not known to the persons whose rights are affected thereby. *See, e.g., In re Doe*, 537 F.Supp. 1038, 1041-42 (D.R.I. 1982), *citing In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1192 (9th Cir. 1981), *aff'd, United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983); *In re Grand Jury Matter*, 495 F.Supp. 127, 134 (E.D.

Pa. 1980); *In re Grand Jury Investigation*, 414 F.Supp. 74 (S.D.N.Y. 1976).

In this case, we have now seen the papers presented to the District Court, and they are published in the Joint Appendix. Those papers reveal nothing about the grand jury investigation not previously known to respondents. The Antitrust Division did not present its "fact memoranda" to the District Court when it appeared *ex parte*, and there is no reason to believe respondents would have obtained those fact memoranda had respondents been present.

On the other hand, if the proceeding had not been *ex parte*, respondents would have been able to demonstrate to the District Court that in *Abbott* the Supreme Court unanimously reaffirmed that (1) legitimate law enforcement goals do not establish particularized need, and (2) blanket disclosure is never authorized by law. Because the Department of Justice legal memorandum to the District Court did not even cite the unanimous decision of the Supreme Court in *Abbott*, the District Court reached its conclusion without a presentation of the applicable law.

In *Doe*, Chief Judge Pettine articulated the problems of *ex parte* proceedings presented by this case:

> It is important to realize that to a large degree 'our legal institutions presuppose a preference for adversariness,' in part because adversary proceedings facilitate informed decisionmaking. Given this established tradition favoring adversary proceedings, an *ex parte* proceeding should be resorted to only when necessary to preserve grand jury secrecy. This secrecy will obviously not be threatened by giving notice and an opportunity to object to disclosure to owners of documents held by the grand jury, inasmuch as these persons are already aware of the documents' contents and the fact that such documents are being reviewed by the grand jury.

537 F.Supp. at 1042 (citations omitted).

Indeed, the Seventh Circuit recently held that such *ex parte* proceedings after the grand jury has expired are a violation of the due process clause of the Fifth Amendment:

> Although Rule 6 establishes no procedure for determining whether and to whom documents or other materials in the grand jury's custody. . . should be released, we think it implicit in the rule, in the inherent character of a judicial system, and most clearly in the due process clause of the Fifth Amendment that a federal court in disposing of property in its control must follow reasonable procedures for the protection of the owner's interest. With power comes responsibility.

In re Special March 1981 Grand Jury, 753 F.2d 575, 579 (7th Cir. 1985). The Seventh Circuit concluded:

> [A]t the very least the appellants have a right to be heard on the disposition of their interests so that they can try to show, as they believe they can show, that the state does not have a legal right to take even temporary custody of all the subpoenaed records.

Id. at 580.

To prevent uninformed adjudication based on a single adversary's arguments in *ex parte* proceedings and to ensure respondents' rights with respect to their property after the conclusion of a grand jury investigation, this Court should hold that *ex parte* proceedings are improper when, as here, nothing is presented to the District Court that is not known to respondents.

Conclusion

For all the foregoing reasons, (1) the use of grand jury materials by the Antitrust Division in preparing and litigating this related civil case, including any use in the civil complaint of facts derived from grand jury jury materials, without obtaining a disclosure order pursuant to Rule 6(e), should be

prohibited; (2) the reversal of the District Court's order permitting disclosure of grand jury materials to the Civil Division should be upheld; and (3) all documents subpoenaed by the grand jury should be returned to their owners.

Dated: New York, N.Y.
August 27, 1986

Respectfully submitted,

*Paul R. Grand
Diana Parker
Grand & Ostrow
641 Lexington Avenue
New York, New York 10022
212-832-3611

Counsel for John Does I and II and John Doe, Inc. I

**Counsel of Record*

Theodore V. Wells, Jr.
Lowenstein, Sandler, Brochin,
65 Livingston Avenue
Roseland, N.J. 07052
201-992-8700

Counsel for John Doe, Inc. II

Walter Sterling Surrey
Carol M. Welu
Jones, Day, Reavis & Pogue
(Surrey & Morse)
1250 Eye Street, N.W.
Washington, D.C. 20005
202-682-4000

Howard Adler, Jr.
Davis, Graham & Stubbs
1001 22nd Street, N.W.
Washington, D.C. 20037

Counsel for John Does III, IV and V and John Doe, Inc. III

(1)

No. 85-1613

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE, INC., I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The primary issue in this case is whether Department of Justice attorneys who conducted a grand jury investigation into possible criminal violations of the antitrust laws may, after termination of the grand jury, review their own memoranda, the transcripts committed to their custody (see Fed. R. Crim. P. 6(e)(1)), and other grand jury materials in preparing for and litigating a related civil case, without first obtaining a court order pursuant to Rule 6(e). The court of appeals acknowledged that it seemed "fictional" to treat such review as a "disclosure" requiring a court order and that the threat of "affirmative mischief" seemed "minimal," but it felt obliged to prohibit such review by what it thought was the "reluctance imposed on us from above." Pet. App. 12a, 16a-17a.

We demonstrated in our opening brief that the court of appeals' skepticism was well-founded. Rule 6(e) draws a line between different *people*, not between an "attorney for the government" and the sources of refreshment of his recollection. Neither the plain language of Rule 6(e) nor

the purposes served by grand jury secrecy—facilitating the investigation and prosecution of crime, protecting the innocent, and preventing misuse of the grand jury—require that a government attorney seek a court order when he is not making any disclosure of "matters occurring before the grand jury" to any other person. No purpose would be served by requiring attorneys on the "prosecution team" to present to a district court in each case the threshold question whether they may participate in a related civil case and may review their own memoranda and other grand jury materials in doing so.[1] The only practical consequence of such an unjustified extension of the meaning of

[1] Respondents assert (Resp. Br. 8-9) that the government does not "own" grand jury materials and that it wrongfully refused to return them in this case. The first assertion is misleading, and the second is false. The most important document that the government attorney will want to review will usually be the lengthy memorandum, prepared by the prosecution team, which summarizes the evidence presented to the grand jury and analyzes the law and other considerations. That "prosecution memorandum" is no doubt "government property," but we fully agree that the members of the prosecution team may not disclose it to *other* people without a Rule 6(e) order. Other important documents are the transcripts of the grand jury's proceedings. "Ownership" of these documents is a moot point: Rule 6(e)(1) expressly provides that the government attorney shall keep them in his custody or control unless the court orders otherwise. Finally, subpoenaed pre-existing documents (which may not be subject to Rule 6(e) at all unless their disclosure would reveal the workings of the grand jury, see, *e.g.*, *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960)), certainly belong to whoever provided them. Here, the government did not wrongfully retain any documents: some documents were returned; only one of the eight respondents requested the return of additional documents, and (in view of the pending civil investigation and the outstanding CIDs) the Antitrust Division and that respondent entered into a mutually satisfactory arrangement for the return of some documents and the copying of others. In sum, the question of ownership has nothing to do with the issues in this case.

"disclosure" would be to force double staffing of cases with a consequent reduction in law enforcement. U.S. Br. 22-37.

A. Respondents and their amici, Archer-Daniels-Midland Company and Nabisco (ADM) assert, without enthusiasm, that (1) review of grand jury materials by attorneys on the prosecution team *is* disclosure. Their principal arguments, however, are that (2) permitting review of grand jury materials by the members of the prosecution team will inevitably lead to unlawful disclosure to other people of "matters occurring before the grand jury"; (3) Rule 6(e) prohibits the review of grand jury materials in connection with a civil case even if there is no disclosure; (4) it is unfair for the government to have access to information that is not automatically available to a civil defendant; and (5) in any event, the question whether an attorney on the prosecution team should be permitted to participate in a subsequent civil case and review grand jury materials should be resolved in each case by a district judge. None of these contentions has merit.

1. It would do substantial violence to the English language to say that a government attorney's continued access, during the civil phase of a dispute, to grand jury material with which he is already familiar constitutes "disclosure" of that material. Since no legislative history counsels otherwise, the rule must be "accept[ed] * * * as meaning what it says" (*Schiavone* v. *Fortune*, No. 84-1839 (June 18, 1986), slip op. 9). Respondents offer no serious argument that such continued access constitutes "disclosure" except (Resp. Br. 18) to misconstrue one remark of the Ninth Circuit as quoted by this Court in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 415, 422 n.6 (1983). As we explained in our opening brief (U.S. Br. 25 n.19), the Ninth Circuit's only point was that a challenge to an improper transfer of materials to a *new* person does not become moot the moment the transfer is made, because the new person's continuing review enlarges the amount of improperly gained knowledge. By contrast, the

prosecutor's continuing access does not tell any person anything Rule 6 did not permit him to know in the first place.

2. Respondents contend (Resp. Br. 13-17) that if attorneys on the prosecution team are permitted to review grand jury materials in connection with a civil case their further actions,[2] including the filing of a civil complaint, will inevitably disclose "matters occurring before the grand jury" to other people. This argument has serious implications, because (as ADM notes (ADM Br. 11)), it applies equally to the use of unrefreshed recollections and suggests that there ought to be a flat prohibition on any participation by attorneys on the prosecution team in the civil case. The argument is, however, without merit.

Respondents are not entitled to suppress information about their conduct merely because a grand jury investigated it: the purpose of grand jury secrecy is to prevent disclosure of the workings of the grand jury itself, not to conceal any information the grand jury happens to have considered. See *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). A complaint need not, and the court of appeals rightly held that the complaint in this case did not, disclose "matters occurring before the grand jury" (Pet. App. 17a). To the contrary, as the court of appeals pointed out, the "complaint * * * does not quote from or refer to any grand jury transcripts or documents subpoenaed by the grand jury, and does not

[2] The court of appeals was not troubled by the risk that continued access by the attorneys themselves would lead to an improper disclosure. The court's concern (Pet. App. 15a-16a), echoed without elaboration by respondents (Resp. Br. 20), was that grand jury materials may be disclosed to secretaries and paralegals working with the attorneys and that such support personnel may, in turn, disclose such materials to others. But, first, we demonstrated in our opening brief that support personnel are properly considered extensions of the attorney (see U.S. Br. 31-33). Second, disclosure *by* such personnel (of which there is no evidence in this case) is no more likely in this context than in a criminal prosecution and would be punishable as contempt.

mention any witnesses before the grand jury or even refer to the existence of a grand jury" (Pet. App. 5a). The court of appeals therefore properly rejected (*id.* at 17a) respondents' contention (Resp. Br. 13-14) that filing the complaint violated Rule 6(e), and respondents did not seek review of that ruling in this Court.[3]

The same fundamental point answers respondents' contention (Resp. Br. 15-18) that continued access would inevitably lead to disclosure in discovery or trial. The mere fact that the government attorney has a refreshed (or unrefreshed) recollection of the grand jury investigation as he frames civil discovery requests, confers with witnesses, or poses questions at trial, does not mean that he is by those actions disclosing the existence or workings of the grand jury. Should the government find that it must disclose matters occurring before the grand jury to conduct discovery or meet its burden of proof at trial, the government will seek a Rule 6(e) order at that time. The government has unequivocally acknowledged its obligation to seek and obtain a Rule 6(e) order before using any grand jury materials in a civil case in a manner that would disclose the workings of the grand jury. See U.S. Br. 18; U.S. C.A. Br. 33.[4]

[3] Respondents claim (Resp. Br. 15) that the government conceded in the district court that "at least 90 percent of the material on which the civil case will be based is grand jury material." But the implication that a reader of the complaint would learn anything about the existence or workings of the grand jury is false. First, while the government certainly did obtain a great deal of material during the grand jury period, as it told the court of appeals (U.S. C.A. Br. 44 n.43) it also obtained a great deal of important information thereafter from other sources, such as CIDs, witness interviews, and voluntary document production. Second, the complaint itself did not directly or indirectly identify anything the grand jury considered or did. The courts below thus correctly rejected the contention that the complaint reveals anything about the existence or workings of the grand jury.

[4] Moreover, a "threshold" Rule 6(e) order permitting attorneys on the prosecution team to participate in the civil case and review grand

Similarly, there is no reason to presume that defendants' discovery requests will require revelation of matters occurring before the grand jury. The government will normally be able to respond, for example, to interrogatories about its case and the evidence it will present at trial without revealing the existence or workings of a grand jury. If the government cannot meet a discovery obligation without disclosures that would require a Rule 6(e) order, the government will seek one at that time. In sum, these problems can and must be dealt with if and when they arise: they are not a reason for denying members of the prosecution team any role in the prosecution of a civil case, or for denying them continued access to materials they have previously prepared or seen.

3. Respondents appear to argue (Resp. Br. 9-11) that in any event Rule 6(e) prohibits all use of the fruits of a grand jury investigation in a related civil case without a court order. This argument, like the preceding one, implies that an attorney on the prosecution team should be barred from any role in the civil case because of his knowledge (even if not refreshed) of the grand jury proceedings.[5]

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jury materials would not authorize government attorneys to disclose matters occurring before the grand jury to other people during discovery and trial: such actions would require additional Rule 6(e) orders. In short, respondents' proposal to require a threshold order does not even address the supposed discovery and trial problems they raise.

[5] This is exactly what ADM contends in its pending petition in No. 85-1840; indeed, ADM there appears to argue that a government attorney who has participated in a grand jury investigation should be indefinitely barred from working on any case involving the same industry. The Court of Appeals for the Eighth Circuit ruled in that case that assignment of attorneys who had participated in a grand jury proceeding to a later civil case does not constitute "disclosure" of grand jury materials to anyone. See 785 F.2d 206, 212 (1986).

But there is no evidence whatever that Congress intended to treat a grand jury investigation as if it were an unconstitutional search.[6] To the contrary, grand jury proceedings are the constitutionally mandated procedure for determining whether there is evidence to warrant charging a felony. As long as the grand jury is used only for proper purposes and there is no disclosure of matters occurring before it, there is no reason why the knowledge thus expensively gained should not be used for otherwise proper law enforcement purposes. There is no evidence that Congress intended to forbid the Department's not uncommon practice (see *Sells,* 463 U.S. at 470-472 (Burger, C.J., dissenting)) of using the same personnel in criminal and civil cases.

This Court ruled in *Sells* that Rule 6(e)(3)(A)(i) does not permit *disclosure* of grand jury materials for noncriminal use without a Rule 6(e) order. But the Court was there concerned with an interpretation of the Rule that would have permitted disclosure to any other attorney in the Department of Justice, for any otherwise proper purpose; the Court expressly declined to address "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15. Nothing in subparagraph (A)(i), a disclosure rule, prohibits such continued use by the same attorney, and there is no evidence that Congress intended such a prohibition. None

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[6] The only legislative history cited by respondents (Resp. Br. 10-11) as support for their position is a statement, at a House Hearing preceding the 1977 amendment of Rule 6(e), by then-Acting Deputy Attorney General Richard Thornburgh. The Court in *Sells* read Thornburgh's statement as supporting the proposition that no "*disclosure* of grand jury materials for civil use should be permitted without a court order" (463 U.S. at 440 (emphasis added; footnote omitted)). Here, however, there has not been any disclosure of grand jury materials without a court order.

of the considerations underlying grand jury secrecy[7] counsels against such use, because it does not widen the circle of knowledge of the workings of the grand jury. And, as we explained in our opening brief (U.S. Br. 35-37), the court of appeals was correct in concluding that such use will not lead to misuse of the grand jury's powers (Pet. App. 13a-15a).

4. Respondents argue (Resp. Br. 7-9, 19-20) that it is simply unfair for government attorneys to have continued access to grand jury materials in a civil case. The answer to this argument has two parts. First, we fully agree that the government may not convene or use the grand jury for the purpose of developing evidence for a civil case. But neither court below concluded, and there is not the slightest evidence, that the grand jury was so used in this case. Nor, as the court of appeals acknowledged (Pet. App. 14a), would there be a temptation to such misuse in any case where the government has extensive civil discovery powers,

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[7] *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979) (footnote omitted): "[W]e have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." Obviously, none of these interests is affected by the prosecution team's continuing access to grand jury materials so long as they are not "made public." Respondents' suggestion (Resp. Br. 12) that witnesses undeterred by the possibility of criminal proceedings would be "less willing to testify" if members of the prosecution team can participate in and review grand jury materials in connection with a subsequent civil case is groundless.

such as it has under the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314. More generally, there is little temptation to improper convening or use of a grand jury for civil purposes where only the attorneys on the prosecution team have access to the grand jury materials and the only permitted use is to refresh their recollections. And since, by hypothesis, the attorneys who conducted the grand jury are before the court in the civil case, it should not be difficult to inquire into a claim of use of the grand jury to gather evidence for the civil case and, if necessary, impose an appropriate remedy.

Second, there is no rule of fairness that requires the government, after a bona fide grand jury investigation, to start from scratch in a civil proceeding.[8] To begin with, the defendants are not starting from scratch: they have superior knowledge of their own conduct and their own records and substantial information they gained from the grand jury proceeding, including the documents they produced and information about the testimony of their own and perhaps other witnesses (who are not under any obligation of secrecy). More fundamentally, the Federal Rules of Civil Procedure seek to prevent trial by surprise, not to put all litigants on an identical footing. If the grand jury proceedings have been conducted in good

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[8] Respondents' suggestion (Resp. Br. 20-22) that the Antitrust Division should proceed initially in all cases with discovery under the ACPA and only after those proceedings are complete convene a grand jury is not to be taken seriously. Deliberate delay of the decision whether to bring a criminal case, and civil discovery in the course of making that decision, are hardly in the interests of the defendant and would greatly prejudice the government: delay would allow critical documents to be destroyed, targets to coordinate their testimony, and criminal statutes of limitations to run. And in any case where government attorneys took the matter to a grand jury but no indictment resulted, the government attorneys would, on the theories advanced by respondents and ADM, still be unable to participate in a civil case because of their participation in the grand jury proceedings.

faith, and if appropriate discovery and a fair trial can be conducted without disclosure of matters occurring before it (or if an appropriate Rule 6(e) order can be framed should such disclosure be necessary), there is no need to waste public resources and impede the search for truth by prohibiting attorneys on the prosecution team from participating in the civil case or from having continuing access to materials already known to them.

5. ADM argues (ADM Br. 23-26) that the issue in this case is not whether government attorneys may ever use their refreshed or unrefreshed recollections of grand jury proceedings in prosecuting a civil case, but only whether they must first get permission from a district court. But apart from the fact that Rule 6(e) simply does not impose such a requirement, neither respondents nor ADM seriously contends that this threshold issue should turn on the facts of a given case. To the contrary, they contend (Resp. Br. 20-21; ADM Br. 10, 23-25) that the government should not be able to make any use of grand jury materials in a civil case where the same information is potentially available (at whatever cost after whatever delay) through civil discovery; and they contend with equal vigor (Resp. Br. 7-8; ADM Br. 16-17) that grand jury materials should not be used where the same information is *not* available to the government through civil discovery. Neither respondents nor ADM suggests any state of facts on which a Rule 6(e) order authorizing an attorney on the prosecution team to participate in the civil case and to review grand jury materials would be proper.

This threshold question—whether an attorney on the prosecution team may participate at all in a related civil case and whether he may review grand jury materials so long as he does not disclose matters occurring before the grand jury to others without a court order—should be answered by this Court. The answer does not depend on the circumstances of the case, and "particularized need" is

not a meaningful criterion in this context. Indeed, a district court order permitting members of the prosecution team to participate in a civil suit and to review grand jury materials would not resolve the supposed problem on which respondents' argument is largely based: the possible need for disclosure to new persons in the course of discovery or trial. That problem, to the extent it is real, can only be dealt with by requiring the government attorney to obtain a Rule 6(e) order before he may disclose matters occurring before the grand jury to someone else during civil discovery or trial. It is at that stage, and not before, that the district court has a meaningful role to play.

B. We demonstrated in our opening brief (U.S. Br. 38-44) that the district court acted well within its "substantial discretion" (*Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979)) when it issued a Rule 6(e) order that permitted disclosure of grand jury materials solely to other government attorneys, under a strict requirement of continuing confidentiality, and expressly limited those attorneys to using the materials for the narrow stated purpose of assisting the Antitrust Division in determining the appropriateness of bringing a False Claims Act count in this case. Compare U.S. Br. 38-44 with Resp. Br. 22-25. Respondents have not answered our arguments.

Respondents do not contend that the purpose for which the government sought disclosure was inconsistent with "the ends of justice" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940)). Nor do they deny that the need to insure consistency in the enforcement of federal law is a "relevant consideration[], peculiar to [the] Government * * * that weigh[s] for * * * disclosure" (*Sells*, 463 U.S. at 445). Finally, respondents do not claim

that the use made of the disclosure here exceeded the narrow and limited scope authorized by the district court. On these points there is no dispute.

Respondents do claim (Resp. Br. 25) that the district court failed to specify in its order precisely what materials would be disclosed to the Civil Division. As we have explained (U.S. Br. 44), however, the purpose for which disclosure was sought made it impossible to specify in advance exactly what information the Civil Division would need in order to offer its expert advice on the False Claims Act.[9] Accordingly, the district court carefully limited the extent of disclosure by a different method: identifying the precise purpose for which disclosure was to be made and limiting disclosure to that purpose.

Respondents also endorse (Resp. Br. 23) the court of appeals' ruling (Pet. App. 10a) that delay and expense "can play no part" in determining whether a Rule 6(e) order should be granted, so that the government must engage in duplicative discovery in any case where it *can* do so. That ruling was erroneous: assuming *arguendo* that a Rule 6(e) order may never be issued solely in order to save time and expense, where as here the time and expense involved are obviously prohibitive in relation to the purpose for which the materials are to be used, denial of an order does not merely impose delay or cost: it defeats a valid government objective (here consultation) and serves no purpose except to hinder law enforcement.

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[9] The purpose of the disclosure was to summarize the case, including the evidence, as precisely as possible, so as to get assistance in making an overall decision. In fact, although the grand jury record here comprised approximately 250,000 pages of documents and testimony, the Antitrust Division disclosed only a few hundred pages of fact memoranda and testimony to the Civil Division. Respondents' assertion that there was a "blanket disclosure" (Resp. Br. 25) is incorrect.

For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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(5)

No. 85-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN DOES, I, II, III, IV, V and
JOHN DOES, INC. I, II, and III,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE ARCHER-DANIELS-MIDLAND COMPANY AND NABISCO BRANDS, INC., IN SUPPORT OF RESPONDENTS

DAVID A. DONOHOE
OWEN M. JOHNSON, JR.
PAUL B. HEWITT
Akin, Gump, Strauss,
Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Petitioner Archer-Daniels-Midland Company

J. RANDOLPH WILSON*
WILLIAM H. ALLEN
CAROL FORTINE
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner Nabisco Brands, Inc.

* *Counsel of Record*

August 28, 1986

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INTEREST OF AMICI CURIAE[1]

Amici Archer-Daniels-Midland Company ("ADM") and Nabisco Brands, Inc. ("Nabisco") are parties to *United States* v. *Archer-Daniels-Midland Co. and Nabisco Brands, Inc.*, 785 F.2d 206 (8th Cir. 1986), a

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[1] Petitioner and respondent have given their written consent to the filing of this brief.

case presenting issues of grand jury secrecy related to those in this case and as to which a petition for writ of certiorari, No. 85-1840, is pending in this Court.

The amici's case arose out of a federal grand jury investigation into alleged price-fixing in the corn wet milling industry, of which ADM and Nabisco are members. The grand jury was dissolved without the issuance of any indictments. Thereafter, the Antitrust Division of the Justice Department investigated the leasing by ADM of two corn wet milling plants from Nabisco, which resulted in the filing of a civil lawsuit against ADM and Nabisco alleging violations of federal antitrust laws. Relevant to the antitrust validity of the ADM/Nabisco lease are the alleged price collusion, as well as other subjects apparently covered by the grand jury investigation of the corn wet milling industry. ADM and Nabisco moved for dismissal without prejudice of the civil action challenging the lease, on the ground that the Government had violated Fed. R. Crim. P. 6(e) by assigning to the civil case, without obtaining a court order, several lawyers and non-lawyers who had extensive knowledge of and continuing access to materials gathered in the course of the grand jury investigation, in which they participated. The district court denied the motion and the Eighth Circuit affirmed. *United States* v. *Archer-Daniels-Midland Co. and Nabisco Brands, Inc.*, 785 F.2d 206 (8th Cir. 1986).

The amici as petitioners for review of the Eighth Circuit's decision in that case have presented in No. 85-1840 questions identical or closely related to the first question presented in this case.

STATEMENT OF THE CASE

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court held that, under Fed. R. Crim. P. 6(e), attorneys in the Civil Division of the Justice Department who have not taken part in a grand jury investigation may not have automatic access to grand jury materials for use in a subsequent civil investigation, but can obtain access only pursuant to a court order upon a showing of particularized need. The Court reasoned, *inter alia*, that automatic access to grand jury materials was limited under Rule 6(e)(3)(A)(i) to those attorneys who conducted the criminal proceeding for use in their prosecutorial function, 463 U.S. at 428-431; that subsection (3)(A)(ii) of the Rule reflected Congress's intent to prohibit the use of grand jury materials in civil proceedings in the absence of a court order, *id.* at 435-42; and that allowing automatic access to nonprosecutors for civil use would undermine the policies underlying Rule 6(e) by increasing the risk of inadvertent or illegal disclosure, threatening the willingness of grand jury witnesses to testify fully and candidly, and tempting prosecutors to misuse the grand jury for civil investigative ends, *id.* at 432-35.

The *Sells* Court, however, did not consider "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15. This case presents the issue thus reserved in *Sells*. It grows out of a grand jury investigation initiated by the Antitrust Division of the Justice Department into alleged bid-rigging and price fixing by American companies in sales of tallow to a foreign government. The grand jury heard testimony

from dozens of witnesses and collected approximately 250,000 documents pursuant to subpoena.

After the grand jury was dissolved without returning indictments, the same attorneys who had conducted the criminal investigation began a civil investigation. They sought and obtained an order under Rule 6(e)(3)(C)(i) permitting disclosure of grand jury evidence to attorneys in the Civil Division of the Justice Department and in the Office of the United States Attorney for the Southern District of New York so that those attorneys could advise whether a civil suit was appropriate under the False Claims Act. The Civil Division advised the Antitrust Division that such a suit would be appropriate; the Antitrust Division then notified respondents that it would file a civil complaint against them under both the Sherman Act and the False Claims Act. Respondents thereupon moved in the district court to vacate the Rule 6(e) order and for a protective order prohibiting continued use of the grand jury materials in the preparation and litigation of the civil suit. The district court denied the requested relief.

On appeal, the Second Circuit vacated the disclosure order upon finding that the Government had not made the requisite showing of particularized need and reversed the district court's denial of respondents' motion to enjoin the Antitrust Division lawyers from any further access to or use of the grand jury materials in the civil action. *In re Grand Jury Investigation*, 774 F.2d 34, 43 (2d Cir. 1985) (Pet. App. 1a-18a.)[2]

[2] This brief addresses only the issue whether the court below was correct in holding that the continued use of or access to grand jury materials in the civil phase of a case by government attorneys who took part in the criminal investigation is prohibited in the absence of a court order. It does not address the issue whether the Second Circuit appropriately vacated the order authorizing disclosure to attorneys who had not participated in the criminal case.

SUMMARY OF ARGUMENT

The central theme of the Government's argument is that the delay and expense incident to recreating grand jury materials through civil process justifies a rule allowing prosecutors to have automatic continued access to grand jury materials for use in civil proceedings. This argument exaggerates the burden on the Government and assumes, erroneously, that the claimed burden is alone sufficient to show a particularized need for disclosure. The Government's supplemental argument that this case presents the question whether government prosecutors should always be disqualified from participation in subsequent civil suits is similarly misdirected. Although it is true that a prosecutor's use in a civil case of unrefreshed recollection of grand jury materials should be treated the same as the use of refreshed recollection of such materials, neither use is absolutely prohibited, but may be permitted pursuant to a (C)(i) court order. At bottom, the Government's position on undue burden or disqualification raises issues more appropriately addressed in a hearing for a disclosure order under Rule 6(e)(3)(C)(i).

The Second Circuit's holding comports with the plain language of Rule 6(e), its legislative history, and the policies underlying the rule of grand jury secrecy.

First, the Second Circuit's holding that allowing government lawyers who had conducted a criminal

investigation continued access to grand jury materials for use in preparing and litigating a civil case was "tantamount to" disclosure is clearly in accord with the plain meaning of the Rule. The term "disclose" means to "make known" or "reveal" something formerly held secret. When a government lawyer is given ar opportunity to use grand jury secrets in drafting civil pleadings, formulating interrogatories and questioning witnesses, there is a disclosure of those secrets within the meaning of the Rule. The Government's contention that one can disclose matters occurring before the grand jury only by physically transferring grand jury documents to someone who has no right to see them does violence to the plain meaning of the Rule as interpreted by this Court and others. The Government's related contention that it is possible for lawyers to make use of grand jury materials in a civil case without revealing their contents to others ignores the realities of case preparation and litigation. Finally, petitioner's argument that government lawyers who worked on the criminal investigation have a "right" to use grand jury materials in subsequent civil litigation by virtue of their initial lawful access to those materials is contrary to this Court's holding in *Sells* that government lawyers are entitled to automatic access to grand jury materials only because of their need to use such materials in performing their duties to enforce federal criminal law.

Second, the legislative history of Rule 6(e) supports the holding of the court below. The history of the Rule and its amendments clearly indicates that Congress contemplated disclosure of grand jury materials to government lawyers only insofar as access was

needed to enable those lawyers to carry out their criminal law enforcement duties. Once the criminal investigation is concluded, the need for such materials to aid the lawyer in his prosecutorial duties evaporates, thereby extinguishing the lawyer's right of access. Moreover, continued use for civil investigative purposes runs counter to clear legislative history indicating Congress's intent to prevent any use of grand jury material in civil cases without the protections afforded by judicial authorization. Congress did not distinguish in this regard between use by lawyers who had participated in the criminal investigation and use by those who had not, and no basis exists for such a distinction.

Indeed, the Government does not point to any affirmative legislative history supporting its claim of the right of prosecutors to continued use. Rather, it relies on an asserted "longstanding" practice of the Justice Department allowing continued use of grand jury materials in civil cases, coupled with the absence of any explicit legislative history indicating disapproval of this alleged "longstanding" practice. Since nowhere in the legislative history does Congress evince any awareness of the Justice Department's asserted practice, however, its failure to expressly disapprove such practice is without import. Moreover, this Court in *Sells* expressly rejected both the claim that the Department has a standard practice of allowing such continued use and the claim that this Court had approved such a practice.

Fourth, the policies underlying the rule of grand jury secrecy support the ruling below. Those policies would be seriously threatened by risks inherent in giving government lawyers an automatic right to use

grand jury materials in related civil litigation, i.e., the risk of disclosure of grand jury materials to others, the risk of dampening the willingness of grand jury witnesses to testify fully and candidly, and the risk of misusing the grand jury for civil investigative ends. Moreover, since these risks are essentially the same regardless of whether or not the government lawyers in the civil case participated in the prior grand jury proceeding, the court below was correct in rejecting the claimed right of automatic access by government lawyers who had participated in the prior grand jury proceeding, just as this Court in *Sells* rejected the claim of automatic access made by government lawyers who did not participate in the grand jury matter.

Finally, the appropriate vehicle for weighing the public interest in allowing government lawyers to have continued access to grand jury materials against the need for continued secrecy is a hearing on a request for a court order based upon a showing of particularized need. Such a hearing would address all of the concerns articulated by the government without abandoning consideration of the interest in continued grand jury secrecy.

None of the Government's contrary arguments is compelling. Thus, the argument that a disclosure order is not compelled by the plain meaning of the Rule is based on the erroneous assumption that prohibited disclosures under the ~~Rule do~~ not include use of refreshed or unrefreshed recollection of grand jury materials in civil litigation. The claim that the delay inherent in seeking such an order is so burdensome that the Court should relieve the Government from complying with this requirement of Rule 6(e) is invalid

on its face. It also ignores this Court's holding in *Sells* that the same considerations should govern disclosure to government movants as well as private ones. The argument that lower courts will inevitably err in applying the standard for issuance of disclosure orders overlooks the courts' experience with the standard and in any event is no justification for forgoing judicial responsibility to apply the legislative mandate. Finally, the claim that there is no function to be performed by hearings on requests for disclosure orders is demonstrably wrong.

ARGUMENT

Introduction

The Government opens its argument with a policy discussion that boils down to a contention that the public interest in protecting the secrecy of grand jury proceedings must give way in every case to an alleged greater public interest in permitting continued use of grand jury materials by lawyers representing the Government in a civil proceeding. (Pet. Br. 20.) The Government urges that a rule forbidding such continued use would require it to recreate the grand jury materials through the use of the Antitrust Civil Practice Act, 15 U.S.C. § 1311 ("ACPA"), or ordinary civil discovery, a prospect that it decries as unduly burdensome, expensive and time-consuming. (*Id.*) The flaw in this argument is threefold.

First, the Government's claims of delay and expense are exaggerated. Since a grand jury investigation is ordinarily much more expansive in scope than an ensuing related civil investigation, the Government will seldom have to duplicate all of the grand

jury materials. Only those materials relevant to the civil lawsuit need be obtained through civil process. Moreover, the Government argues elsewhere in its brief, when urging that the ACPA eliminates any incentive to abuse the grand jury process to generate evidence for a civil suit, that "conducting a grand jury investigation . . . involves considerably more effort and expense than civil discovery under the ACPA." (Pet. Br. 36.) The Government also insists that it merely wants its lawyers to have the opportunity to review grand jury materials and not to make them publicly available. If this is indeed all that the Government seeks, then it would be required in any event to use civil discovery to duplicate such of the grand jury materials as it wishes to offer in evidence, append to pleadings, or otherwise make public in the civil proceeding.

Second, this Court has repeatedly held that the delay and expense of alternative discovery methods does not by itself ordinarily constitute "particularized need" for disclosure of grand jury materials pursuant to court order. *Sells*, 463 U.S. at 431, 460 U.S. 557, 565-73 (1983); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958); *Smith* v. *United States*, 423 U.S. 1303, 1304 (1975) (Douglas, J., in chambers). *A fortiori*, delay and expense alone will not justify a rule allowing government lawyers automatic access to grand jury materials for civil investigative purposes.

Third, the Government's argument concerning expense and delay is properly addressed to a court considering a motion for disclosure under Rule 6(e)(3)(C)(i). (*See* Part V, *infra*.)

The Government's introductory discussion tenders, apparently as its clinching policy argument, that the

ultimate question in this case is whether attorneys who conduct a criminal investigation must be disqualified from participating in a subsequent related civil lawsuit. (Pet. Br. 20-21.) It contends that disqualification would necessarily follow from acceptance of the Second Circuit's view that such attorneys cannot have free access to grand jury materials. The Government says that if the rule were to prohibit such attorneys from using their refreshed recollection of grand jury materials, then their unrefreshed recollection of the materials would also subject them to challenges. (*Id.*)

The Government is correct in its belief that "it would make no sense" under Rule 6(e) to treat a lawyer's refreshed knowledge of grand jury materials differently from his unrefreshed recollection of such materials. (Pet. Br. 27.) If an opportunity to review grand jury materials for use in civil litigation is disclosure violative of the letter and policy of Rule 6(e), then the opportunity to use unrefreshed recollection of matters occurring before the grand jury is equally a disclosure permitted only pursuant to a court order under 6(e)(3)(C)(i).

The Government is wrong, however, in asserting that the question is therefore one of disqualification. The Second Circuit held, in accordance with this Court's opinion in *Sells*, that continued access by government lawyers to grand jury materials for use in a civil case is not per se prohibited but may be permitted pursuant to a (C)(i) court order upon a showing of particularized need. (Pet. App. 17a.) This applies to all attorneys who conducted the prior grand jury investigation: they are not forever barred from the civil case but may be assigned to it pursuant to such

a court order based on a showing of particularized need.

I. THE SECOND CIRCUIT'S INTERPRETATION OF RULE 6(e) AS PROHIBITING THE CONTINUED USE OF GRAND JURY MATERIALS IN THE CIVIL PHASE OF A DISPUTE BY GOVERNMENT ATTORNEYS WHO PARTICIPATED IN THE CRIMINAL INVESTIGATION IS FULLY CONSISTENT WITH THE PLAIN MEANING OF THE RULE.

The Government assails the Second Circuit's holding as contravening what it asserts to be the "plain meaning" of the term "disclose" as used in Rule 6(e). In truth, however, it is the Government's interpretation of that term that does violence to the plain meaning of Rule 6(e).

The Government notes that the dictionary definition of "disclose" is "to open up[,] to expose to view[,] * * * [to] open up to general knowledge" (Webster's Third New International Dictionary 325 (1976 ed.)), and "to make known or public * * * something previously held close or secret" (Webster's New Collegiate Dictionary 325 (1975 ed.)). (Pet. Br. 24.) It then repeatedly makes the remarkable assertion that, when government attorneys rely on their unrefreshed recollection of grand jury materials or refer to those materials to refresh their recollection, and then participate in a subsequent civil suit making use of their refreshed or unrefreshed recollection, they do not "make known" formerly secret grand jury information. (Pet. Br. 24, 26.) The Government apparently contends either that the "plain meaning" of "disclose" encompasses only the act of physically transferring the grand jury materials from one to another (Pet. Br. 25, 26), or that a former grand jury lawyer

will never in any way disclose grand jury secrets in the subsequent civil case but will simply review the materials and then make no further use of them. (Pet. Br. 27.)

Both contentions are wrong. First, the proposition that one can "disclose" grand jury secrets within the meaning of Rule 6(e) only by physically showing or transferring grand jury materials to someone is inconsistent with the terms of the rule. Rule 6(e)(2) prohibits the disclosure of "matters occurring before the grand jury"; it is not limited to the physical transfer or display of grand jury transcripts or documents. One can obviously "disclose" or "make known" "matters occurring before the grand jury" by talking about them or by writing them down and revealing the writing to others as well as by showing the original embodiment of the grand jury secret to another.[3]

Second, to pretend that grand jury secrets will never be revealed in the civil suit by a government lawyer who has continued access to them simply ignores the realities of trial preparation and litigation. A grand jury lawyer involved in a subsequent civil investigation will not be referring to grand jury materials to satisfy any personal curiosity. He will be

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[3] *See, e.g.*, In re Special February 1975 Grand Jury, 662 F.2d 1232, 1238 (7th Cir. 1981) (fact memorandum to file, summary of case and summary of testimony all subject to Rule 6(e)), *aff'd sub. nom.* United States v. Baggot, 463 U.S. 476 (1983); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981) ("matters occurring before the grand jury" include "not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal . . . the substance of testimony . . ."); In re Grand Jury Investigation, 610 F.2d 202, 216-17 (5th Cir. 1980) (same).

referring to them for use in drafting pleadings, questioning witnesses and formulating trial strategy. Each time such a lawyer drafts a complaint paragraph setting forth facts or theories gleaned from grand jury materials, he "makes known" to all who read the complaint the grand jury secrets. Similarly, each time he formulates questions to witnesses based on facts in secret grand jury proceedings, or drafts an interrogatory based on such secrets, or formulates strategy with co-counsel based on knowledge gleaned from the grand jury materials, he "exposes to view" those previously secret facts.[4]

The weakness of its position on the meaning of "disclosure" is apparent in the Government's argument that grand jury attorneys, after gaining initial lawful access to grand jury materials, thereafter have a "right" to use the materials in civil litigation because such use "does not expand the scope of their initial lawful use" permitted under the plain language of the Rule. (Pet. Br. 27.) This argument is nothing more than a variation of the totally discredited position that Rule 6(e) permits government attorneys to have automatic access to grand jury materials for both criminal and civil investigative purposes. Rejection of this argument was the Court's point of departure in *Sells*. It held that government attorneys are initially allowed access to grand jury materials

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[4] *Cf., e.g.*, United States v. McDaniel, 482 F.2d 305, 311-12 (8th Cir. 1973) (where federal prosecutor read immunized testimony of state grand jury witness before participating in federal criminal proceeding against witness, indictment must be dismissed since testimony "could not be wholly obliterated from the prosecutor's mind" and thus must be presumed to have been used in the preparation and trial of the case.)

"not for the general and multifarious purposes of the Department of Justice, but because both the grand jury's functions and their own *prosecutorial* duties require it." *Sells*, 463 U.S. at 429 (emphasis in original). The continued use of grand jury materials at issue in this case obviously "expand[s] the scope" of such initial, lawful prosecutorial use to include use in civil litigation.

II. THE LEGISLATIVE HISTORY OF RULE 6(e) SUPPORTS THE SECOND CIRCUIT'S DECISION.

This Court held in *Sells* that the legislative history of Rule 6(e) clearly indicated that disclosure of grand jury materials for use in civil litigation by attorneys who took no part in the criminal investigation should not be permitted without a court order. 463 U.S. at 440. That legislative history cannot be squared with the anomalous position now urged by the Government that grand jury prosecutors have an automatic right to use grand jury materials in preparing and litigating a subsequent civil action, whereas other government attorneys cannot use such materials without a court order.

Rule 6(e), as originally enacted, allowed government attorneys automatic access to grand jury materials only "inasmuch as they may be present in the grand jury room during the presentation of evidence." Advisory Committee Notes on Federal Rule of Criminal Procedure 6(e), 18 U.S.C. App., p. 1411. As this Court explained in *Sells*, the Advisory Committee Notes reflect Congress's intent to allow access only to attorneys actually working on the criminal matter, and only because the grand jury's functions and the prosecutor's duties require it. 463 U.S. at 429.

Obviously, once the grand jury investigation is closed, continued access to grand jury materials for use in civil litigation is not justified by the reasons that justify access for criminal prosecutors.

As this Court recognized in *Sells*, the legislative history of the 1977 amendment to Rule 6(e) indicates that there should be no opportunity for use of grand jury materials in a civil suit without a court order under subsection (C)(i) of Rule 6(e)(3). 463 U.S. at 440. This history fully supports a ruling that would allow the assignment of a grand jury lawyer to a subsequent civil case or the grand jury lawyer's continued access to grand jury documents pertinent to the civil case only pursuant to an order obtained upon a showing of particularized need.

The 1977 amendment to Rule 6(e) added the provision in Rule 6(e)(3)(A)(ii) allowing disclosure to nonlawyers consisting of "such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The amendment, as originally proposed, was not limited to enforcement of the federal "criminal law". Thus, the House of Representatives, after hearings on the proposal, voted to disapprove it. 123 Cong. Rec. 11108-12 (1977). The House committee's report recommended disapproval specifically because

> "[i]t was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable

> those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them." H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 4 (1977) (footnote omitted).

The Senate Judiciary Committee altered the proposal by inserting the criminal-law use limitation, in order to "allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws . . .." S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977); *see also id.* at 1-2, 5-7.

The clear concern of Congress was the risk of use of grand jury materials in civil litigation without the protections afforded by the requirement of obtaining court authorization. As this Court recognized in *Sells*, this concern applies to the risk of such use by the Justice Department as well as by others. 463 U.S. at 438-40; *see Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 67 (1977) (statement of Acting Deputy Attorney General Richard Thornburgh). Moreover, no distinction was drawn in the legislative history between risk of use by attorneys who participated in the grand jury proceedings and risk of use by attorneys who had not. Rather, as this Court noted in *Sells*, "the key distinction was between disclosure for criminal use, as to which access should be automatic, and for civil use, as to which a court order should be required." 463 U.S. at 440.

The Government cites no legislative history affirmatively supporting its view that grand jury attorneys

should be allowed continued access to grand jury materials that are pertinent to civil litigation. Rather, it points to the *lack* of any legislative history indicating Congressional disapproval of what it asserts to be the Department of Justice's "longstanding practice" of allowing attorneys who participated in grand jury proceedings to review grand jury materials in considering and preparing a subsequent civil suit. (Pet. Br. 28-29.) It also asserts that this Court approved this "longstanding practice" in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), wherein the Court noted that in that case, "the Government [was] using the grand jury transcripts to prepare for trial [in a civil case]," 356 U.S. at 678. (Pet. Br. 28.) Neither of those arguments has merit.

To begin with, none of the advisory notes or legislative history that the Government cites indicates any Congressional awareness of a governmental "practice" of allowing continued use of grand jury materials in civil litigation by government attorneys. Thus, Congress's failure to indicate any disagreement with such practice is neither surprising nor significant.

Moreover, the argument that the Court in *Procter & Gamble* "approved" continued use of grand jury materials in a civil case by attorneys who have participated in the grand jury proceeding was expressly rejected by this Court in *Sells*.[5] The Court also rejected the Government's "standard practice" argument, because such " 'standard practice' was somewhat inconsistent with itself, and in many instances resulted in use of grand jury materials that clearly would now be considered illegal under Rule 6(e)." 463 U.S. at 440 n. 30.

[5] "The Government contends that the issue of Government access for civil use was settled in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). We disagree . . . The passages from that decision so heavily relied on by the dissent . . . are simply the Court's recognition that civil use of properly created grand jury materials is not per se illegal. The Court did not address, however, the *conditions* under which such civil use by the Government could be permitted, since the issue in the case was only whether private parties could obtain access. In particular, no issue was presented in the case as to whether, having used the grand jury for strictly criminal purposes, the Government should have been permitted to use the grand jury's records for civil ends (*whether through the same attorneys or different ones* . . .) The Court's opinion did not discuss that aspect of the case at all." 463 U.S. at 434 n. 19 (last emphasis added).

III. THE POLICIES UNDERLYING THE RULE OF GRAND JURY SECRECY SUPPORT THE HOLDING BELOW.

This Court held in *Sells* that allowing access to grand jury materials in civil litigation by lawyers who took no part in the criminal investigation threatened inadvertent or illegal disclosure to others, threatened to chill the testimony of grand jury witnesses and risked manipulation of the grand jury for civil investigative ends. 463 U.S. at 432-35. All of these considerations apply as well to the use of refreshed or unrefreshed recollection of grand jury materials by lawyers who participated in the criminal investigation.

A. The Risk of Illegal or Inadvertent Disclosure

The Government argues that there is minimal risk of inadvertent or illegal disclosure to others because

there is no increase in the number of persons with access to grand jury materials. This argument makes the same erroneous assumption as the Government's plain meaning argument, *i.e.*, that the only type of disclosure prohibited by Rule 6(e) is the act of showing or transferring grand jury materials to others not authorized to receive them. But, as the discussion at pp. 13-14, 17, *supra*, makes clear, where government attorneys working on the civil phase of a dispute have continued access to secret grand jury information, the risk of disclosure to other attorneys working on the case, to witnesses, and to the public is essentially the same, whether or not the same government attorneys in the civil case previously participated in the grand jury proceeding.

Moreover, as the Second Circuit correctly held, continued use of grand jury materials by lawyers involved in the civil lawsuit carries with it the likelihood that paralegals and secretarial staff, including those who did not work on the grand jury proceeding, will also be exposed to the material. (Pet. App. 15a-16a.) This obviously increases the risk that illegal or inadvertent disclosure to others will occur. The Government's contention that this risk is no greater than that posed by support personnel working with an attorney on a criminal investigation ignores the possibility of disclosure by new support staff working with the materials and disregards the warning of this Court in *Sells* that *any* threat to the secrecy of grand jury proceedings must be prevented unless clearly authorized by law. 463 U.S. at 425.

B. The Chilling of Grand Jury Witness Testimony

The Second Circuit also correctly held that the continued use of grand jury materials in the civil phase

of a dispute clearly poses a risk of chilling the testimony of grand jury witnesses. (Pet. App. 16a.) The Government seeks to downplay this risk by pointing out that grand jury witnesses are already subject to having their testimony revealed under the provisions of the Jencks Act or pursuant to a court order under Rule 6(e)(3)(C)(i), and may have their testimony compelled under the provisions of the Antitrust Civil Practice Act. (Pet. Br. 33.) It also suggests that a prosecutor can rely on his recollection of their testimony in preparing a later civil suit. Therefore, the Government argues, a witness not "chilled" by these other potential uses of his testimony would not be deterred by the prospect of wholesale automatic use in a civil case by attorneys who worked on the criminal case. (*Id.*)

The Government's argument is wrong for several reasons. First, the attempt to equate routine use of grand jury materials in civil litigation with other limited uses authorized by law fails at the outset. The Jencks Act authorizes the disclosure of statements of government witnesses, including grand jury testimony, only if the witness is called by the United States to testify at trial, only to the criminal defendant, and only insofar as it relates to the subject matter of the witness's testimony at trial. 18 U.S.C. § 3500; *see, e.g., Palermo* v. *United States*, 360 U.S. 343, 349 (1959); *United States* v. *Minkin*, 504 F.2d 350, 356 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). Similarly, a disclosure order under Rule 6(e) will issue only upon a showing that the material is needed to avoid injustice in another proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request for disclosure

applies only to materials so needed. *Sells*, 463 U.S. at 443. Obviously these types of uses are not equivalent to the wholesale, automatic use of grand jury materials in civil litigation by government lawyers who participated in the grand jury proceedings. They simply do not implicate this Court's clear concern in *Sells* that "[i]f a witness knows or fears that his testimony before the grand jury will be *routinely available for use in governmental civil litigation* . . . he may well be less willing to speak for fear that he will get himself into trouble in some other forum." 463 U.S. at 432 (emphasis added).

Second, revelation under the Jencks Act or pursuant to a Rule 6(e) order or compelled production pursuant to the ACPA is in each case clearly authorized by statute or rule and thus is permissible despite any chilling effect it may have on grand jury witnesses. The possibility that the witness will see his grand jury testimony made public for any of the suggested reasons does not argue for letting a government lawyer refer to it and use it for civil litigation as proposed by the Government, for "[i]n the absence of a clear indication in a statute or Rule," *any* threat to grand jury secrecy is to be forestalled. *Id.* at 425. In any event, the availability of the ACPA to compel testimony in a civil proceeding is not the same as the availability of the grand jury testimony itself.

C. The Threat to the Integrity of the Grand Jury

Although the Second Circuit found that the free use of grand jury materials proposed by the Government posed no threat to the integrity of the grand jury (Pet. App. 14a), we submit that it does. The Government is proposing wholesale, routine availability of grand jury documents in civil litigation by government attorneys who previously had access to those materials in the criminal proceeding. It defies reality to say that if grand jury materials are so freely available, the Government will have no incentive to use the grand jury to collect information useful in a later civil suit. This Court was concerned in *Sells* that, "[if] prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely." 463 U.S. at 432. The concern applies as well to prosecutors who know they can themselves make use of the materials. This is particularly true if the government's complaints of the burdensomeness of ACPA (Pet. Br. 20, 42) are to be taken at face value.

Moreover, the concern of the Court in *Sells* was "based less on the belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove." *Id.* at 432. The Government's suggestion that the grand jury lawyer will be readily available to testify if a question of misuse arises (Pet. Br. 37) obviously does not answer this concern.

IV. A COURT ORDER UNDER RULE 6(e)(3)(C)(i) IS THE APPROPRIATE VEHICLE FOR BALANCING THE INTEREST OF GRAND JURY SECRECY AGAINST THE GOVERNMENT'S NEED FOR CONTINUING ACCESS TO GRAND JURY MATERIALS IN PARTICULAR CIVIL CASES.

All of the Government's concerns about any need for its civil lawyers to have access to grand jury

materials can be properly addressed in a hearing on a request for a court disclosure order under Rule 6(e)(3)(C)(i). The standard for granting such an order is "flexible" and "accommodates any relevant consideration peculiar to Government movants," as this Court explained in *Sells*:

> "The *Douglas Oil* [*Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)] standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others . . . [T]he standard . . . accommodates any relevant consideration peculiar to Government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public. Similarly, we are informed that it is the usual policy of the Justice Department not to seek civil use of grand jury materials until the criminal aspect of the matter is closed. *Cf. Douglas Oil*, *supra*, at 222-223. And 'under the particularized-need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body . . . .' [*Illinois* v.] *Abbott* [& Associates, Inc.], 460 U.S. [557], at 567-568 n.15 [(1983)]. On the other hand, for example, in weighing the need for disclosure, the court could take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure." 463 U.S. at 445.

None of the Government's arguments for dispensing with the requirement of a disclosure order is compelling. The Government first says such an order is not required by the plain meaning of Rule 6(e). (Pet. Br. 37, n. 32.) This argument assumes that the prohibited disclosure under the Rule does not include reference to and use of grand jury materials in civil litigation, which, as discussed at p. 13, *supra*, is simply wrong.

The Government next argues that the delay incident to seeking a court order is unduly burdensome. (Pet. Br. 37, n. 32.) But such delay is inherent in the requirement that an order be sought to limit inroads on grand jury secrecy and cannot provide a reason for eliminating the protection such an order affords. Moreover, private parties face the same delay as does the Government, and this Court in *Sells* expressly held that the same standard governing disclosure to private parties applies to the Government as well. 463 U.S. at 444. Thus, unless the Government is prepared to concede that the delay incident to requesting a court order should eliminate any requirement for private parties or the Government to seek such orders, its argument lacks force.

The Government also argues that "if this Court were to articulate an appropriate standard," lower courts might err in applying it. (Pet. Br. 37, n. 32.) But this Court has already articulated the appropriate standard in *Sells*, which is the same standard of particularized need long applicable to private litigants and which lower courts have had considerable expe-

rience applying.[6] In any event, that some courts may err in applying the standard is clearly not a reason for abandoning judicial responsibility to interpret and apply the legislative mandate.

Finally, the Government argues that there is no useful function served by a Rule 6(e)(3)(C)(i) hearing, as the question of continued use in a civil proceeding is a general question that this Court should answer. (Pet. Br. 37, n. 32.) This argument, if accepted, would reverse the main thrust of Rule 6(e), which mandates that continued use of grand jury materials in a civil proceeding is generally impermissible, and would substitute the erroneous concept that continued use by government lawyers is generally permissible. The function of a hearing on a request for court-ordered disclosure is the important one of "weighing carefully" reasons for disclosure, such as those advanced in this case by the Government, against the need for secrecy, "[a]nd if disclosure is ordered, . . . includ[ing] protective limitations on the use of the disclosed material," *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). That function cannot be performed by a general rule allowing automatic access.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[6] *See, e.g.*, In re Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 286-88 (8th Cir. 1978); Illinois v. F.E. Moran, Inc., 740 F.2d 533, 540 (7th Cir. 1984); Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233, 238-42 (5th Cir. 1963); Illinois v. Harper & Row Publishers, Inc., 50 F.R.D. 37, 40-42 (N.D. Ill. 1969).

Respectfully submitted,

J. RANDOLPH WILSON
WILLIAM H. ALLEN
CAROL FORTINE
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner
Nabisco Brands, Inc.

DAVID A. DONOHOE
OWEN M. JOHNSON, JR.
PAUL B. HEWITT
Akin, Gump, Strauss, Hauer
& Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

Attorneys for Petitioner
Archer-Daniels-Midland Company